

No. 23-16102

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JUSTIN DOWNING,

Plaintiff-Appellant,

v.

LOWE’S HOME CENTERS, LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona
No. 3:22-cv-08159-SPL
Hon. Steven P. Logan

EXCERPTS OF RECORD

Volume 1 of 1

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Justin Downing,

10 Plaintiff,

11 v.

12 Lowe's Companies Incorporated, et al.,

13 Defendants.
14

NO. CV-22-08159-PCT-SPL

AMENDED JUDGMENT OF

DISMISSAL IN A CIVIL CASE

15 **Decision by Court.** This action came for consideration before the Court. The
16 issues have been considered and a decision has been rendered.

17 IT IS ORDERED AND ADJUDGED that pursuant to the Court's order filed July
18 31, 2023, Plaintiff to take nothing, and the complaint and action are dismissed with
19 prejudice as to all claims against Defendant Lowe's Companies Incorporated.

20 Debra D. Lucas

District Court Executive/Clerk of Court

21
22 August 2, 2023

23 s/ Rebecca Kobza

24 By Deputy Clerk
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Justin Downing,

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NO. CV-22-08159-PCT-SPL

**JUDGMENT OF DISMISSAL IN A
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16 issues have been considered and a decision has been rendered.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Justin Downing,)	No. CV-22-08159-PCT-SPL
)	
Plaintiff,)	ORDER
vs.)	
)	
Lowe’s Companies Incorporated, et al.,)	
)	
Defendants.)	

Before the Court is Plaintiff Justin Downing’s (“Plaintiff”) Motion for Certification of Judgment (Doc. 31) in which Plaintiff requests that the Court direct the entry of final judgment with respect to Defendant Lowe’s Companies Incorporated (“Lowe’s”), pursuant to Federal Rule of Civil Procedure 54(b). The Motion is fully briefed and ready for review. (Docs. 31, 32, & 33). The Court rules as follows.¹

On June 20, 2023, the Court granted Lowe’s’ motion to dismiss and dismissed the company from this action with prejudice. (Doc. 29). The Court found that, as a matter of law, Lowe’s did not violate 15 U.S.C. § 1681b(b)(2)(A) of the Fair Credit Reporting Act (“FCRA”). (*Id.* at 14). This action was not dismissed entirely, however, as Plaintiff’s two separate claims against Defendant First Advantage Corporation (“First Advantage”) remain. (*See* Doc. 28 (June 8, 2023 Order *denying* First Advantage’s motion to dismiss)).

¹ Because it would not assist in resolution of the instant issues, the Court finds the pending Motion suitable for decision without oral argument. *See* LRCiv. 7.2(f); Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 Plaintiff seeks to appeal this Court’s June 20, 2023 Order dismissing his claims against
 2 Lowe’s. (Doc. 31 at 2). He now seeks entry of final judgment pursuant to Rule 54(b).

3 Rule 54(b) provides that where, as here, an action involves multiple claims or
 4 parties,

5 the court may direct entry of a final judgment as to one or more,
 6 but fewer than all, claims or parties *only if the court expressly*
determines that there is no just reason for delay.

7 Otherwise, any order or other decision, however designated,
 8 that adjudicates fewer than all the claims or the rights and
 9 liabilities of fewer than all the parties does not end the action
 10 as to any of the claims or parties and may be revised at any
 time before the entry of a judgment adjudicating all the claims
 and all the parties' rights and liabilities.

11 Fed. R. Civ. P. 54(b) (emphasis added). “The Rule was adopted ‘specifically to avoid the
 12 possible injustice of delaying judgment on a distinctly separate claim pending adjudication
 13 of the entire case.’” *Krause v. Yavapai Cnty.*, No. CV 19-08054-PCT-MTL (ESW), 2020
 14 WL 4530467, at *1 (D. Ariz. Aug. 6, 2020) (alterations omitted) (quoting *Jewel v. Nat’l*
 15 *Sec. Agency*, 810 F.3d 622, 628 (9th Cir. 2015)). “The Rule thus aimed to augment, not
 16 diminish, appeal opportunity.” *Id.* (quoting *Jewel*, 810 F.3d at 628). “It is left to the sound
 17 judicial discretion of the district court to determine the appropriate time when each final
 18 decision in a multiple claims action is ready for appeal.” *Id.* (internal quotation marks
 19 omitted) (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980)). “In
 20 making this determination, it is proper for courts to consider ‘whether the claims under
 21 review were separable from the others remaining to be adjudicated and whether the nature
 22 of the claims already determined was such that no appellate court would have to decide the
 23 same issues more than once even if there were subsequent appeals.’” *Id.* (quoting *Curtiss-*
 24 *Wright Corp.*, 446 U.S. at 8).

25 The Court may only exercise its discretion to enter a Rule 54(b) final judgment if it
 26 first “render[s] an ultimate disposition of an individual claim” and then “find[s] that there
 27 is no just reason for delaying judgment on this claim.” *Pakootas v. Teck Cominco Metals*,
 28

1 *Ltd.*, 905 F.3d 565, 574 (9th Cir. 2018). “The burden is on the party endeavoring to obtain
 2 Rule 54(b) certification to demonstrate that the case warrants certification.” *First*
 3 *Amendment Coal. of Ariz., Inc. v. Ryan*, No. CV-14-01447-PHX-NVW, 2016 WL
 4 4236373, at *1 (D. Ariz. Aug. 10, 2016). Courts must consider two prongs when
 5 determining whether there is just reason for delaying entry of judgment. *Jewel*, 810 F.3d
 6 at 628. First, the court must analyze “juridical concerns,” including “whether the certified
 7 order is sufficiently divisible from the other claims such that the case would not inevitably
 8 come back to [the Court of Appeals] on the same set of facts.” *Id.* Second, courts conduct
 9 an “equitable analysis” in which they “focus on traditional equitable principles such as
 10 prejudice and delay.” *Gregorian v. Izvestia*, 871 F.2d 1515, 1519 (9th Cir. 1989). The
 11 parties agree that the Court’s June 20, 2023 Order constituted an “ultimate disposition” of
 12 Plaintiff’s claims against Lowe’s. (*See* Doc. 32 at 5, n.1 (Lowe’s conceding that “there has
 13 been an ‘ultimate disposition’ of the claims against it”). Thus, the Court need only
 14 consider whether juridical concerns and equitable principles demonstrate that there is no
 15 just reason for delaying judgment on Plaintiff’s two FCRA claims against Lowe’s.

16 With respect to juridical concerns, the Court agrees with Plaintiff that the claims
 17 against Lowe’s rest on entirely independent legal theories and facts as compared to the
 18 still-pending claims against First Advantage. In fact, Lowe’s itself concedes this,
 19 recognizing that the issues presented by the claims against Lowe’s are “largely distinct”
 20 from those presented by the claims against First Advantage, and that “the overwhelming
 21 likelihood is that any appeal [on the Lowe’s claims] would have little bearing on the
 22 remaining claims [against First Advantage].” (Doc. 32 at 6). Thus, the Court finds that this
 23 is *not* the sort of case where the “legal right to relief stems largely from the same set of
 24 facts and would give rise to successive appeals that would turn largely on identical, and
 25 interrelated, facts.” *Wood v. GCC Bend, LLC*, 422 F.3d 873, 880 (9th Cir. 2005).

26 As to equitable considerations, the Court also agrees with Plaintiff that—because
 27 this Court has already rendered an ultimate disposition as to his claims against Lowe’s—
 28 denying Plaintiff the opportunity to appeal now would mean that his claims against Lowe’s

1 would merely “stagnate” until Plaintiff’s claims against First Advantage are resolved and
2 final judgment is entered. (*See* Doc. 31 at 5). Given that this case was filed in September
3 2022, is only just beyond the motion-to-dismiss stage, and involves potential class
4 certification issues, this delay could be substantial. Plaintiff contends that a lengthy delay
5 would “prejudice both parties in the form of unavailability of witnesses, the potential loss
6 of pertinent records, and faded memories.” (Doc. 31 at 6). Lowe’s responds that Plaintiff’s
7 assertion of harm “is a generic argument that would apply in virtually every situation in
8 which a portion of the case is dismissed and others proceed.” (Doc. 32 at 7). Lowe’s also
9 points out that there is no risk of severe financial harm. (*Id.*). The Court agrees with Lowe’s
10 that Plaintiff’s assertions of potential harm are not novel to a situation such as this.
11 Moreover, the harms are speculative, as Plaintiff fails to offer any specific details
12 explaining how or why the unavailability of witnesses or the loss of certain records is likely
13 to occur. Nonetheless, the Court finds that the equities weigh in favor of granting Plaintiff’s
14 Motion. The Court is not aware of any harm that will be caused to Lowe’s by allowing
15 Plaintiff to appeal this Court’s dismissal of the Lowe’s claims, particularly given that those
16 claims are entirely distinct and independent from the First Advantage claims. This total
17 lack of harm is outweighed by the harm put forth by Plaintiff, despite Plaintiff’s harm being
18 somewhat speculative. At the least, a significant delay could occur. In turn, that delay could
19 cause a host of other issues for both parties.

20 In sum, the Court finds that there is no just reason for delay. There is almost no risk
21 that granting Plaintiff’s Rule 54(b) request will cause duplicate proceedings before the
22 Ninth Circuit because the Lowe’s claims are wholly and definitively separate from the First
23 Advantage claims. Further, in the absence of a Rule 54(b) judgment, there is a reasonable
24 chance that a *significant* delay will occur with respect to final resolution of the Lowe’s
25 claims. This chance for a delay (and the possible issues that may occur because of it)
26 outweighs any potential harm to Lowe’s.

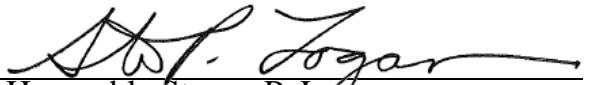
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1 Accordingly,

2 **IT IS ORDERED** that Plaintiff's Motion for Certification of Judgment (Doc. 31)
3 is **granted**. The Clerk of Court is directed to **enter a final judgment** dismissing with
4 prejudice all claims against Defendant Lowe's Companies Incorporated pursuant to
5 Federal Rule of Civil Procedure 54(b).

6 Dated this 31st day of July, 2023.

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8 
9 Honorable Steven P. Logan
United States District Judge

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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Justin Downing,) No. CV-22-08159-PCT-SPL
9)
10 Plaintiff,) **ORDER**
11 vs.)
12 Lowe's Companies Incorporated, et al.,)
13 Defendants.)
14 _____

15 Before the Court is Defendant Lowe's Companies Incorporated's ("Lowe's" or
16 "Defendant") Motion to Dismiss (Doc. 18). Defendant requests dismissal of Counts I and
17 II of Plaintiff Justin Downing's ("Plaintiff") Amended Complaint (Doc. 11). Defendant's
18 Motion has been fully briefed and is ready for review. (Docs. 18, 23, & 24). For the
19 following reasons, the Motion is granted.¹

20 **I. BACKGROUND**

21 In February 2022, Plaintiff applied for a job with Lowe's. (Doc. 11 at 5). As part of
22 the hiring process, Plaintiff was provided with several acknowledgments of company
23 disclosures, including the following disclosure regarding a background report:

24 **DISCLOSURE REGARDING BACKGROUND REPORT**

25 Lowe's . . . may obtain a "background report" about you or
26 your child/ward for employment purposes from a third-party

27 ¹ Because it would not assist in resolution of the instant issues, the Court finds the
28 pending Motion suitable for decision without oral argument. *See* LRCiv. 7.2(f); Fed. R.
Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 consumer reporting agency. “Background report” means any
2 written, oral, or other communication of any information by a
3 consumer reporting agency bearing on your or your
4 child’s/ward’s credit worthiness, credit standing, credit
5 capacity, character, general reputation, personal
6 characteristics, or mode of living. The reports may include
7 information regarding your or your child’s/ward’s history,
8 criminal history, social security verification, motor vehicle
9 records, verification of your education or employment history,
10 or other background check results.

11 Lowe’s will not request any information related to your or your
12 child’s/ward’s worthiness, credit standing, or credit capacity
13 without providing you or your child/ward, separately, with
14 information related to the use of that information and obtaining
15 separate authorization from you to obtain such information,
16 where required.

17 (the “Disclosure”) (Doc. 13 at 2–3). On February 26, 2022, Plaintiff indicated his
18 acknowledgment of the Disclosure by signing it. (*Id.*). Thereafter, Lowe’s contracted with
19 First Advantage Corporation (“First Advantage” or, together with Lowe’s,
20 “Defendants”)—a consumer reporting agency (“CRA”) that provides, among other things,
21 “background screening services to employers nationwide”—to compile and furnish the
22 background report. (Doc. 11 at 5, 7).

23 Between February 26 and March 2, 2022, First Advantage “commenced a search
24 for Plaintiff’s past criminal history to be included in his consumer report.” (*Id.*). On March
25 2, 2022, First Advantage provided a completed background report to Lowe’s. (*Id.*). On
26 March 10, 2022, Lowe’s denied Plaintiff employment “based in whole or in part on
27 information contained within his consumer report.” (*Id.* at 8–9). Plaintiff alleges that the
28 background report inaccurately included three past criminal convictions with the
disposition stated as “guilty.” (*Id.* at 7). Although Plaintiff admits to pleading guilty to
three criminal charges between 2006 and 2009, he contends that “it is not accurate to state
that the disposition of those cases is ‘guilty’” because, on November 24, 2020, the three
judgments of guilt were set aside by the Navajo County Superior Court, pursuant to
A.R.S. § 13-905. (*Id.* at 7–8).

///

On September 8, 2022, Plaintiff filed this action against Defendants Lowe’s and First Advantage.² (*See* Doc. 1). Plaintiff filed it as a class action suit, asserting his claims on behalf of himself and all those similarly situated. (Doc. 11 at 9). The Amended Complaint defines two separate classes—the “Lowe’s Class” and the “First Advantage Class.” (*Id.*). The Lowe’s Class is defined as:

All persons in the United States who (1) from a date two years prior to the filing of the initial complaint in this action to the date notice is sent to the Class; (2) applied for employment with Lowe’s; (3) about whom Lowe’s procured a consumer report; and (4) who were provided the same form FCRA disclosure and authorization as the disclosure and authorization form Lowe’s provided to Plaintiff.

(*Id.*).³ Plaintiff alleges that Defendants’ actions—relating to the disclosure, procurement, compiling, and furnishing of the background report upon which his denial of employment was based—violated the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681, *et seq.* (*Id.* at 1–4). In Count I, Plaintiff and the Lowe’s Class assert a claim against Lowe’s for violation of the FCRA’s “standalone” disclosure requirement, which is found in § 1681b(b)(2)(A). (*Id.* at 12–15). In Count II, Plaintiff and the Lowe’s Class assert a claim against Lowe’s for violation of the FCRA’s “clear and conspicuous” disclosure requirement, which is also found in § 1681b(b)(2)(A).⁴ (*Id.* at 15–18). On November 10, 2022, Defendant Lowe’s filed the present Motion seeking dismissal with prejudice of

² On October 27, 2022, Plaintiff filed the Amended Complaint (Doc. 11), which remains the operative complaint in this matter.

³ The First Advantage Class is defined as: “All persons in the United States (1) from a date two years prior to the filing of the initial complaint in this action to the date notice is sent to the Class; (2) about whom First Advantage provided a consumer report; (3) to any employer or potential employer; (4) where the consumer report contained a criminal disposition of “guilty”; and (5) where the consumer’s conviction had been set aside pursuant to A.R.S. § 13-905.” (Doc. 11 at 9).

⁴ In Counts III and IV, Plaintiff and the First Advantage Class assert claims against First Advantage for violation of §§ 1681e(b) and 1681k(a), provisions concerning the procedures that a CRA must follow when preparing a consumer report. (Doc. 11 at 18–25).

Counts I and II. (Doc. 18). Plaintiff later filed a Response. (Doc. 23). Defendant has since filed a Reply brief (Doc. 24), along with two separate Notices of Supplemental Authority (Docs. 26 & 27). The Court has fully considered the parties' briefing, Defendant's Notices of Supplemental Authority, and the entire record in this matter.

II. LEGAL STANDARDS

A. Rule 12(b)(6) Standard

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A court may dismiss a complaint for failure to state a claim under Rule 12(b)(6) for two reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A claim is facially plausible when it contains "factual content that allows the court to draw the reasonable inference" that the moving party is liable. *Ashcroft*, 556 U.S. at 678. Factual allegations in the complaint should be assumed true, and a court should then "determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. Facts should be viewed "in the light most favorable to the non-moving party." *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013).

B. FCRA Overview

"Congress enacted [the] FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). In pursuing these goals, the FCRA "regulates the creation and the use of consumer reports by [CRAs] for certain specified purposes, including credit transactions, insurance, licensing, consumer-initiated business transactions, and employment." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 334–35 (2016) (citations omitted) (internal quotations omitted). "[T]he statute imposes . . . a panoply of procedural obligations and creates a private right of action for consumers to enforce compliance." *Gomez v. EOS CCA*, No. CV-18-02740-PHX-JAT (DMF), 2020 WL

3271749, at *2 (D. Ariz. June 17, 2020) (citing *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113–14 (9th Cir. 2017)). Specifically relevant to the instant Motion is § 1681b, the provision under which Plaintiff asserts two claims against Lowe’s. (*See* Doc. 11 at 12–18). Section 1681b “covers permissible purposes for consumer reports,” and subsection (b) “relates to consumer reports for employment purposes.” *Juster v. Workday, Inc.*, 617 F. Supp. 3d 1128, 1134 (N.D. Cal. 2022). Section 1681b(b)(2)(A) provides as follows:

[A] person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless . . . *a clear and conspicuous disclosure has been made* in writing to the consumer at any time before the report is procured or caused to be procured, in a document *that consists solely of the disclosure*, that a consumer report may be obtained for employment purposes.

§ 1681b(b)(2)(A)(i) (emphasis added). “The question of whether a disclosure is ‘clear and conspicuous’ within the meaning of [§] 1681b(b)(2)(A)(i) is separate from the question of whether a document consists ‘solely’ of a disclosure.” *Syed v. M-I, LLC*, 853 F.3d 492, 503 (9th Cir. 2017).

III. DISCUSSION

Plaintiff in this case alleges that the Lowe’s Disclosure violated § 1681b(b)(2)(A)(i). (Doc. 11 at 18–25). Plaintiff contends that the Disclosure contains (i) extraneous language relating to background checks of children or wards and (ii) a confusing, conflicting explanation as to future disclosures related to credit information. (Doc. 23 at 7). Plaintiff argues that, as a result, the Disclosure did not consist solely of the disclosure, and was not clear and conspicuous, in violation of the FCRA. (*Id.*). In its Motion, Defendant requests that this Court dismiss both of Plaintiff’s claims against Lowe’s for failure to state a claim. (Doc. 18 at 6). Defendant argues that the Disclosure satisfied the standalone requirement because it did not contain any extraneous information. (*Id.* at 9–13). Likewise, Defendant argues that the Disclosure satisfied the clear and conspicuous requirement because it was readily noticeable and reasonably understandable to the consumer. (*Id.* at 13–15). Defendant alternatively argues that, even if Plaintiff could establish that the Lowe’s

1 Disclosure violated the substantive requirements of § 1681b, Plaintiff's claims must be
 2 dismissed nonetheless because he failed to plausibly allege that Lowe's willfully or
 3 negligently violated the statute. (*Id.* at 15–22).

4 As explained below, the Court finds that the Disclosure in this case complied with
 5 the standalone requirement and was clear and conspicuous. Questions concerning whether
 6 a particular disclosure meets the requirements § 1681b(b)(2)(A) are questions of law
 7 properly decided by the Court at this motion-to-dismiss stage. *See Wynn v. United Parcel*
 8 *Serv., Inc.*, No. 21-cv-10029-CRB, 2023 WL 2324288, at *4, n.1 (N.D. Cal. Mar. 1, 2023)
 9 (citation omitted) (rejecting plaintiff's argument that the court was required to assume as
 10 true plaintiff's allegation that disclosure was *not* clear and conspicuous and did *not* comply
 11 with standalone requirement because such "statements are legal conclusions, which the
 12 Court is 'not bound to accept as true'"); *Mitchell v. Winco Foods, LLC*, 379 F. Supp. 3d
 13 1093, 1099 (D. Idaho 2019) (alterations omitted) (quoting *Gilberg*, 913 F.3d at 1177))
 14 ("The Ninth Circuit . . . has 'assumed, without deciding, that clarity and conspicuousness
 15 under FCRA present questions of law rather than fact.'"). Because the Court finds that the
 16 Disclosure in this case meets the FCRA requirements, dismissal of Plaintiff's claims is
 17 appropriate. The Court need not reach Defendant's arguments with respect to whether
 18 Plaintiff sufficiently alleged willfulness or negligence because the Court finds that, as a
 19 matter of law, the Disclosure in this case does not violate the FCRA.

20 **A. Alleged Violation of the Standalone Requirement (Count I)**

21 Section 1681b(b)(2)(A)'s standalone requirement provides that the disclosure must
 22 be made "in a document that consists *solely* of the disclosure." § 1681b(b)(2)(A)(i)
 23 (emphasis added). The Ninth Circuit has interpreted this to require that the disclosure
 24 "contain nothing more than the disclosure itself" and that it "not contain any extraneous
 25 information" beyond the disclosure required by the FCRA. *Walker v. Fred Meyer, Inc.*,
 26 953 F.3d 1082, 1087–88 (9th Cir. 2020) (citations and quotations omitted). That said, an
 27 employer's disclosure is *not* limited to a plain statement that "a consumer report may be
 28 obtained for employment purposes." *Id.* at 1084. Rather the Ninth Circuit explained that:

[B]eyond a plain statement disclosing “that a consumer report may be obtained for employment purposes,” some concise explanation of what that phrase means *may* be included as part of the “disclosure” required by § 1681b(b)(2)(A)(i). For example, a company could briefly describe what a “consumer report” entails, how it will be “obtained,” and for which type of “employment purposes” it may be used. Such information would further the purpose of the disclosure by helping the consumer understand the disclosure.

Id. at 1088–89 (internal citations omitted) (emphasis added).

The Disclosure at issue contains only four sentences. The question, then, is whether any of these sentences contains “extraneous information” falling outside the scope of the FCRA disclosure requirement as interpreted by the Ninth Circuit in cases like *Walker*. The first sentence states that Lowe’s “may obtain a ‘background report’ about you or your child/ward for employment purposes from a third-party consumer reporting agency.” (Doc. 13 at 2). Setting aside its reference to the applicant’s “child/ward”—which is discussed in greater depth below—this sentence merely provides the disclosure envisioned and explicitly required by the FCRA, that is, it provides the disclosure “that a consumer report may be obtained for employment purposes.” § 1681b(b)(2)(A)(i). The Court finds the first sentence does not contain any extraneous information in violation of the FCRA.

The second sentence states that “[b]ackground report’ means any written, oral, or other communication of any information by a consumer reporting bearing on your or your child’s/ward’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.” (Doc. 13 at 2). Again setting aside the sentence’s reference to the applicant’s “child/ward” for later discussion, the Court finds that the second sentence does not contain any extraneous information. Rather, the sentence merely explains the type of information that may be included in the background report and, in doing so, borrows directly from the FCRA’s definition of “consumer report.” *See* § 1681a(d)(1) (defining “consumer report” as “any written, oral, or other communication of any information by a [CRA] bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living”);

1 *see also Walker*, 953 F.3d at 1089, n.9 (finding that language explaining “what type of
2 information may be included in the ‘consumer report’” does not violate standalone
3 requirement and noting disclosure’s specific language “tracks the language of the FCRA”).

4 The third sentence states that the report “may include information regarding your or
5 your child’s/ward’s history, criminal history, social security verification, motor vehicle
6 records, verification of your education or employment history, or other background check
7 results.” (Doc. 13 at 2). Again setting aside the sentence’s reference to the applicant’s
8 “child/ward” for later discussion, the Court finds that the third sentence does not contain
9 any extraneous information. In *Walker*, the Ninth Circuit considered a very similar
10 sentence which stated that “[t]o prepare the reports, [the CRA] may investigate your
11 education, work history, professional licenses and credentials, references, address history,
12 social security number validity, right to work, criminal record, lawsuits, driving record and
13 any other information with public or private information sources.” *Walker*, 953 F.3d at
14 1090. The Ninth Circuit found that this sentence “elucidate[s] what it means to ‘obtain’ a
15 consumer report by providing helpful information about . . . what private and public
16 information about the applicant will be examined to create a ‘consumer report.’” *Id.* The
17 Ninth Circuit found that the language therefore did *not* violate the FCRA’s standalone
18 requirement. *Id.* In accordance with the *Walker* decision, this Court also finds that the third
19 sentence merely provides additional information as it relates to what private and public
20 information may be examined to create the background report and that the third sentence
21 therefore does not violate the standalone requirement.

22 The final sentence states that “Lowe’s will not request any information related to
23 your or your child’s/ward’s worthiness, credit standing, or credit capacity without
24 providing you or your child/ward, separately, with information related to the use of that
25 information and obtaining separate authorization from you to obtain such information,
26 where required.” (Doc. 13 at 3). Plaintiff argues that this sentence “relate[s] to the potential
27 for an *additional* disclosure and authorization” and therefore “pulls attention away from
28 the rights at issue by informing applicants that there will be some other form or forms to

review later.” (Doc. 23 at 9 (emphasis in original)). To be sure, the Ninth Circuit has consistently recognized as extraneous any information that “pulls the applicant’s attention away from his privacy rights protected by the FCRA.” *Syed v. M-I, LLC*, 853 F.3d 492, 502 (9th Cir. 2017); *see also Gilberg*, 913 F.3d at 1175–76; *Walker*, 953 F.3d at 1090–91. The caselaw cited by the parties provides examples of such attention-diverting information. In *Syed*, the disclosure contained a liability waiver stating, “I hereby discharge, release and indemnify prospective employer . . . from any and all liability and claims arising by reason of the use of this release and dissemination of information that is false and untrue if obtained by a third party without verification.” *Syed*, 853 F.3d at 497–98. The Ninth Circuit found that the inclusion of the liability waiver violated the standalone requirement because instead of “focus[ing] the applicant’s attention on the nature of the personal information the prospective employer may obtain,” it called the applicant’s “attention to the rights he must forego if he signs the document.” *Id.* at 502. The Ninth Circuit explained that, in reading the disclosure, an applicant “could reasonably conclude that his signature was not consent to the procurement of the consumer report, but to a broad release of the employer from claims arising from the totality of the ‘investigative background inquiries’ referenced in the first sentence of the form.” *Id.*

Likewise, in *Gilberg* and *Walker*, the disclosures contained language relating to non-FCRA rights held by the applicant. Specifically, in *Gilberg*, the disclosure stated, in part, that “[y]ou have the right, upon written request made within a reasonable time after receipt of this notice, to request whether a consumer report has been run about you, and the nature and scope of any investigative consumer report, and request a copy of your report.” *Gilberg*, 913 F.3d at 1172. Similarly, the *Walker* disclosure provided that

You may inspect [the CRA]’s files about you . . . by providing identification to the [CRA]. If you do, [the CRA] will provide you help to understand the files, including communication with trained personnel and an explanation of any codes. Another person may accompany you by providing identification. If [the CRA] obtains any information by interview, you have the right to obtain a complete and accurate disclosure of the scope and nature of the investigation performed.

1 *Walker*, 953 F.3d at 1090. In both cases, the Ninth Circuit found that the language
 2 concerning the applicant’s other rights violated the standalone requirement. The Ninth
 3 Circuit reasoned that such language was “as likely to confuse as it is to inform” because it
 4 concerned rights outside the scope of the FCRA. *Gilberg*, 913 F.3d at 1175–76. The Ninth
 5 Circuit noted that it understood *why* the employers sought, “in good faith,” to provide such
 6 information to applicants but that the language “should have been provided in a separate
 7 document, because the information cannot reasonably be deemed part of a ‘disclosure . . .
 8 that a consumer report will be obtained for employment purposes.’” *Walker*, 953 F.3d at
 9 1090–91 (quoting § 1681b(b)(2)(A)(i)).

10 Unlike the liability waiver in *Syed* and the language referencing the applicant’s non-
 11 FCRA rights in *Gilberg* and *Walker*, the final sentence in the Lowe’s Disclosure does not
 12 divert the applicant’s attention away from his or her rights under the FCRA. Rather, the
 13 Court finds that the sentence—which explains that certain credit-related information will
 14 only be obtained if a separate authorization is signed—is merely part of the Disclosure’s
 15 “concise explanation” of what it means for Lowe’s to obtain a consumer report. *See*
 16 *Walker*, 953 F.3d at 1088–89. This is similar to a sentence analyzed in *Warr*, a case relied
 17 upon by Defendant. In *Warr*, the disclosure stated that the applicant’s “[c]redit history
 18 [would] only be requested where such information [was] substantially related to the duties
 19 and responsibilities of the position for which [the applicant was] applying.” *Warr v. Cent.*
 20 *Garden & Pet Co.*, No. 20-cv-09405-JST, 2021 WL 6275013, at *5 (N.D. Cal. Sept. 21,
 21 2021). The Northern District of California rejected the plaintiff’s argument that such a
 22 phrase was extraneous, reasoning that the phrase appropriately “describ[ed] what a
 23 ‘consumer report’ entails” and nothing more. *Id.* at *6 (citing *Walker*, 953 F.3d at 1088–
 24 89). In a similar manner, the final sentence in the Lowe’s Disclosure reasonably describes
 25 “what a ‘consumer report’ entails” and “how it will be ‘obtained,’” *see Walker*, 953 F.3d
 26 at 1084, by explaining that a specific category of information—that is, information related
 27 to the applicant’s worthiness, credit standing, or credit capacity—would *not* be requested
 28 by Lowe’s unless the applicant signed a separate authorization. For purposes of the

standalone-requirement analysis, the Court sees no meaningful difference between reasonably informing the applicant that credit-related information must be “substantially related” to the employment position before such information will be obtained, and informing the applicant that a separate authorization will be provided to the applicant before credit-related information will be obtained. In both cases, the disclosures are simply informing the applicant that a specific category of information will *not* be part of the consumer report unless some additional condition is satisfied. The Court finds that the final sentence of the Lowe’s Disclosure does not violate the standalone requirement.

Finally, Plaintiff argues that the Disclosure’s inclusion of “extra language purporting to allow First Advantage to pull reports for either the applicant ‘or [their] child/ward’” renders the entire Disclosure to be in violation of the standalone requirement. (Doc. 23 at 9). Plaintiff explains that this language makes the Disclosure “not one, standalone disclosure, but a joint disclosure for multiple people” and that it “functions to pull the applicant’s attention away.” (*Id.* at 9–10). The Court is unpersuaded. This language merely informs the applicant of *whose* information might be obtained as part of the background report, which falls squarely within the scope of “describ[ing] what a ‘consumer report’ entails.” *Walker*, 953 F.3d at 1084.

In sum, the Court finds that the Lowe’s Disclosure did not contain any extraneous information and that, as a matter of law, it does not violate the standalone requirement. The Court concludes that dismissal of Count I with prejudice is appropriate.

B. Alleged Violation of the Clear and Conspicuous Requirement (Count II)

As noted above, § 1681b(b)(2)(A) requires that the disclosure be “clear and conspicuous.” § 1681b(b)(2)(A)(i). The Ninth Circuit has interpreted “clear” to mean “reasonably understandable,” and “conspicuous” to mean “readily noticeable to the consumer.” *Gilberg v. Cal. Check Cashing Stores, LLC*, 913 F.3d 1169, 1176 (9th Cir. 2019) (citations and quotations omitted). “The Ninth Circuit has analyzed each prong separately.” *Mitchell*, 379 F. Supp. 3d at 1099 (citing *Gilberg*, 913 F.3d at 1177)).

Here, Plaintiff alleges that the Disclosure was unclear for two reasons.⁵ First, he contends that the Disclosure “confusingly informs applicants that Lowe’s may obtain consumer reports regarding the applicant ‘or their child/ward,’ with no explanation.” (Doc. 23 at 11 (alteration omitted)). Second, he contends that the Disclosure was unclear because it indicated that Lowe’s would not seek credit-related information without a separate authorization from the applicant. (*Id.* at 11–12). Defendant objects to both arguments, asserts the Disclosure was sufficiently clear, and requests dismissal of Plaintiff’s claim for violation of the clear-and-conspicuous requirement. (Doc. 18 at 13–15).

The Court agrees with Defendant and finds that the Disclosure was reasonably understandable and therefore sufficiently clear for purposes of the FCRA. The Disclosure does not “contain[any] language that a reasonable person would not understand.” *See Gilberg*, 913 F.3d at 1177. Rather, the Disclosure straightforwardly provides that Lowe’s may obtain a background report and that such report will concern the consumer/applicant or his or her “child/ward.” (Doc. 13 at 2–3). The Disclosure provides the statutory definition of “background report” to help the consumer/applicant understand what the report may entail and what types of information it may contain. (*Id.*). Finally, the Disclosure advises that no credit-related information will be requested by Lowe’s unless the company first obtains independent authorization from the consumer/applicant or his or her “child/ward.” (*Id.*). The Disclosure is short, to-the-point, and does not contain any typographical or grammatical errors. *Compare with Gilberg*, 913 F.3d at 1177 (discussing how grammatical error relating to use of semi-colon rendered disclosure unclear). As discussed above, the Disclosure in this case stands on its own and does not contain any

⁵ There is no dispute that the Disclosure was conspicuous. It included a heading stating “DISCLOSURE REGARDING BACKGROUND REPORT” and making the Disclosure readily noticeable to the applicant. (*See* Doc. 13 at 2). Indeed, Plaintiff appears to concede the “conspicuousness” issue and focuses his argument on the “clearness” prong instead. (*See* Doc. 23 at 11 (“Here, Lowe’s disclosure may have been presented with a conspicuous heading to indicate to applicants what they were reviewing, but . . . the Disclosure is not clear.”)). The Court will do the same and finds that the Disclosure was sufficiently conspicuous for purposes of the clear-and-conspicuous requirement.

extraneous, unrelated, or otherwise confusing terms that would lead a reasonable reader astray. A reasonable, prospective employee is provided full notice of what Lowe’s intends to do as it relates to the background report, and such employee is able to make an informed decision as to whether he or she wishes to authorize the action. *See Syed*, 853 F.3d at 496 (“The disclosure and authorization provision codified at 15 U.S.C. § 1681b(b)(2)(A) was intended to address [Congress’ concern that prospective employers were violating applicants’ privacy rights] by requiring the prospective employer to disclose that it may obtain the applicant’s consumer report for employment purposes and providing the means by which the prospective employee might prevent the prospective employer from doing so—withholding of authorization.”).

Moreover, the Court is unpersuaded by the Complaint’s allegations that the Disclosure was unclear. The Disclosure’s repeated references to the consumer or applicant’s “child/ward” are not confusing; rather, the references simply disclose to the reader that Lowe’s may obtain information about their child. Plaintiff argues that ambiguity exists as to “whether Lowe’s intends to procure a consumer report regarding the applicant, their children/wards, or both.” (Doc. 23 at 11 (citing Doc. 11 at 3)). Even assuming such ambiguity exists, however, the Court cannot find that the entire Disclosure is rendered confusing, misleading, or otherwise unclear as a result. Whether the report concerns “the applicant, their children/wards, or both” is of no matter to the FCRA disclosure requirement. Rather, the Act requires only “a clear and conspicuous disclosure . . . that a consumer report may be obtained for employment purposes.” § 1681b(b)(2)(A)(i). The Disclosure here does just that; it *clearly* discloses that Lowe’s may obtain, for purposes of employment, a background report concerning the consumer/applicant or their child/ward. In other words, the Disclosure’s inclusion of language relating to the reader’s child/ward “does not create confusion as to the person or entity that will conduct the report” and therefore does not violate § 1681b(b)(2)(A)’s clear and conspicuous requirement. *Keefer v. Ryder Integrated Logistics, Inc.*, No. 21-cv-07503-HSG, 2023 WL 1442891, at *4 (N.D. Cal. Feb. 1, 2023) (quoting *Warr*, 2021 WL 6275013, at *7).

1 Similarly, the Court finds that the Disclosure is not rendered unclear by its final
2 sentence which states that certain credit-related information will not be included in the
3 background report unless further authorization is obtained. Plaintiff argues that this
4 sentence “creates confusion as to what sort of report may be pulled and what report is
5 actually being disclosed.” (Doc. 23 at 11). According to Plaintiff, the sentence “seems to
6 contradict the notion that Lowe’s intends to obtain a background report at all—it is not
7 reasonably understandable why Lowe’s would disclose that it may obtain a report
8 containing various information, only to state in the same form that it will not do so without
9 providing further disclosure.” (*Id.* at 11–12). The Court does not agree. As discussed above,
10 the Disclosure’s final sentence merely provides that a specific category of information—
11 *i.e.*, information related to the applicant’s worthiness, credit standing, or credit capacity—
12 would *not* be requested by Lowe’s unless the applicant signed a separate authorization. The
13 Disclosure’s previous inclusion of “information . . . bearing on your or your child’s/ward’s
14 credit worthiness, credit standing, [and] credit capacity” in its definition of “background
15 report” does not contradict the Disclosure’s final sentence. Stated more simply, the
16 Disclosure is essentially stating that “Lowe’s may obtain a background report for
17 employment purposes. The term ‘background report’ may include information bearing on
18 X, Y, and Z. However, Employer will not request any information bearing on X without
19 obtaining separate authorization.” The Court finds this to be more than reasonably
20 understandable. Plaintiff has failed to sufficiently allege that the Disclosure used by Lowe’s
21 was not clear and conspicuous.

22 **IV. CONCLUSION**

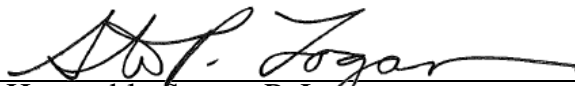
23 The Court finds that the Disclosure in this case lacked any extraneous information
24 in violation of the standalone requirement, and that it was reasonably understandable such
25 that it did not violate the clear-and-conspicuous requirement. As a matter of law, the
26 Disclosure did not violate § 1681b(b)(2)(A) of the FCRA and Counts I and II are dismissed
27 with prejudice.

28 ///

1 Accordingly,

2 **IT IS ORDERED** that Defendant's Motion to Dismiss (Doc. 18) is **granted**.
3 Counts I and II are **dismissed with prejudice**, and Defendant Lowe's Home Centers LLC
4 is dismissed from this action.

5 Dated this 20th day of June, 2023.

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8 Honorable Steven P. Logan
United States District Judge
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Justin Downing, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

Lowe's Home Centers, LLC, a North
Carolina corporation, and First Advantage
Corporation, a Delaware corporation,

Defendants.

No. 3:22-cv-08159-SPL

**LOWE'S HOME CENTERS, LLC'S
MOTION TO DISMISS
COUNTS I AND II**

Assigned to Hon. Steven P. Logan

ORAL ARGUMENT REQUESTED

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employment purposes,” and thus, it essentially mirrors the statutory language in 15 U.S.C. § 1681b(b)(2)(A). The second sentence similarly mirrors the statutory definition of a consumer report in 15 U.S.C. § 1681a(d)(1). *Compare* Am. Compl., Ex. A at 2–3 (“‘Background report’ means any written, oral, or other communication of any information by a consumer reporting agency bearing on your or your child’s/ward’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.”), *with* 15 U.S.C. § 1681a(d)(1) (“The term ‘consumer report’ means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living[.]”). And the remaining two sentences fit comfortably within *Walker*’s holding that an employer may include in its disclosure language that “elucidate[s] what it means to ‘obtain’ a consumer report by providing helpful information,” including a description of “what private and public information about the applicant will be examined.” *Walker*, 953 F.3d at 1090; *see also*, e.g., *Williams*, 2020 WL 13328483, at *5 (dismissing claim because the employer’s form “explains the disclosure ‘in plain language’ in four succinct sentences”) (quoting *Luna*, 956 F.3d at 1153); *Rivera*, 2022 WL 3219411, at *8–9 (dismissing claim for similar reasons); *Warr v. Cent. Garden Pet Co.*, 2021 WL 6275013, at *5 (N.D. Cal. Sept. 21, 2021) (same).

Downing’s claim to the contrary “stretches the statute’s requirements beyond the limits of law and common sense.” *Luna*, 956 F.3d at 1152. He alleges that Lowe’s disclosure violates the standalone requirement in two ways, but neither argument has merit.

First, Downing alleges that the disclosure “unlawfully combines a disclosure to obtain consumer reports about [prospective employees] with a disclosure to obtain consumer reports about their children or wards.” Am. Compl. ¶ 53. But the detailed explanation of the potential scope of the consumer report is not extraneous—to the contrary, it is precisely the sort of explanation that the Ninth Circuit has encouraged employers to include in their disclosures because it provides “helpful information about . . . what private and public information about the applicant will be examined to create a consumer report.”

The Northern District of California recently rejected a similar argument to the one Downing seeks to raise here—namely, that an employer’s disclosure violated the standalone requirement because the information the employer sought was allegedly “overbroad and excessively intrusive.” *Juster v. Workday, Inc.*, --- F. Supp. 3d ---, 2022 WL 3030530, at *6 (N.D. Cal. Aug. 1, 2022) (granting motion to dismiss). There, the court held that even if the employer was legally *prohibited* from obtaining “the breadth of the information that it claimed it could,” that was “not the kind of problem with which the FCRA is concerned,” because “the prospective employee is not being misled about what type of information the employer *wants to get*.” *Id.* (emphasis added). Fundamentally, a disclosure’s reference to “a type of background information that may be obtained” cannot be extraneous because it is not “something *other than* the disclosure,” and instead is “a brief explanation of what a consumer report is and what can be obtained.” *Id.* at *7 (emphasis in original).

Second, Downing alleges that the fourth sentence of Lowe’s disclosure contains “additional extraneous information” by explaining (as he paraphrases it) that Lowe’s “will not request any information relates [sic] to applicant’s [sic] or their children’s/ward’s ‘worthiness, credit standing, or credit capacity’ unless it provides a separate disclosure and authorization for such credit information.” Am. Compl. ¶ 54. But this sentence simply explains that Lowe’s will not seek one subtype of information that can be included in a background report—credit information—without additional notice and authorization. *Id.*, Ex. A. at 2–3. Thus, the sentence provides “helpful information about . . . what private and public information about the applicant will be examined.” *Walker*, 953 F.3d at 1090.

Once again, a court in this Circuit already has held that a straightforward application of *Walker* forecloses an argument virtually identical to the one Downing makes here. In *Warr*, the plaintiff challenged language in an employer’s disclosure that, as here, indicated that the employer might not immediately, or ever, seek the applicant’s credit information.

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Justin Downing, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

Lowe's Home Centers, LLC, a North
Carolina limited liability company, and
First Advantage Corporation, a Delaware
corporation,

Defendants.

Case No. 3:22-cv-08159-SPL

**FIRST AMENDED CLASS ACTION
COMPLAINT**

JURY TRIAL DEMANDED

Plaintiff Justin Downing (“Plaintiff” or “Downing”) brings this first amended class action complaint against Defendants Lowe's Home Centers, LLC (“Lowe’s”) and First Advantage Corporation (“First Advantage”, and collectively with Lowe’s, “Defendants”) to obtain redress for Defendants’ serial violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* (“FCRA” or “Act”). Specifically, Plaintiff files the instant lawsuit to address: (1) Lowe’s failure to provide lawful notices and disclosures to its job applicants and employees, (2) First Advantage’s practice of failing to implement reasonable policies and procedures to ensure the maximum possible accuracy of the information contained in consumer reports, and (3) First Advantage’s failure to adopt

1 strict procedures to ensure that adverse information contained in consumer reports is
2 complete and up to date. Plaintiff seeks redress for all individuals similarly injured by the
3 Defendants' conduct. Plaintiff, for his Complaint, alleges as follows upon personal
4 knowledge as to himself and his own acts and experiences, and, as to all other matters,
5 upon information and belief, including investigation conducted by his attorneys.

6 NATURE OF THE ACTION

7 1. Enacted to promote the accuracy, fairness, and privacy of consumer
8 information contained in the files of consumer reporting agencies, the FCRA explicitly
9 protects consumers from disclosure of their personal information contained in their
10 consumer reports. To that end, employers who obtain and use consumer reports regarding
11 their job applicants and employees are required to provide, prior to obtaining consumer
12 reports in the first place, a clear and conspicuous disclosure, in a document consisting
13 solely of the disclosure (*i.e.*, that stands alone), that a consumer report will be obtained
14 for employment purposes. And for their part, when preparing the reports, consumer
15 reporting agencies must implement and follow procedures designed to ensure maximum
16 possible accuracy of the information they provide concerning the individuals about whom
17 the reports relate and to ensure that the information is complete and up to date.

18 2. Defendant Lowe's willfully violated the FCRA by: (1) failing to provide a
19 standalone, upfront disclosure that Defendant may procure consumer reports about its
20 applicants and employees, and (2) failing to provide a clear and conspicuous disclosure
21 prior to obtaining consumer reports.

22 3. Lowe's willfully violated the FCRA by failing to provide applicants or
23 employees with a standalone disclosure that clearly and conspicuously indicates—in a
24 document consisting *solely* of the disclosure—that Lowe's may obtain a consumer report
25 about them for employment purposes. That is, Lowe's provides a single disclosure that
26 includes extraneous information regarding Lowe's supposed ability to obtain consumer
27 reports regarding the applicant's children/wards. The disclosure also contains additional
28

1 extraneous information regarding future disclosures and authorizations that may be
2 sought.

3 4. The inclusion of such extraneous information overshadows the consumer
4 report disclosure and renders the disclosure confusing to Plaintiff and to any reasonable
5 person. By including extraneous information, it is unclear as to whether Lowe's intends
6 to procure a consumer report regarding the applicant, their children/wards, or both. This
7 lack of clarity frustrates the purpose of the FCRA, which is to inform consumers and
8 allow them a meaningful opportunity to authorize such disclosures. Plaintiff was
9 confused by the disclosure, and had a lawful disclosure been provided, Plaintiff would
10 not have signed it.

11 5. For its part, Defendant First Advantage willfully violated the FCRA by
12 furnishing consumer reports while failing to implement and follow reasonable procedures
13 to ensure the maximum possible accuracy of the information contained in the report. That
14 is, First Advantage compiled consumer reports regarding Plaintiff and class members that
15 included inaccurate dispositions of past criminal histories.

16 6. First Advantage also willfully violated, and continues to violate, the FCRA
17 by failing to maintain (or follow) strict procedures designed to ensure that public record
18 information is complete and up to date when it is included in consumer reports and is
19 likely to have an adverse effect on a consumer's ability to obtain employment. Here, First
20 Advantage furnished consumer reports relating to Plaintiff and class members containing
21 outdated and incomplete dispositions of past criminal histories.

22 7. By failing to adopt (or follow) reasonable or strict procedures as required,
23 First Advantage furnished consumer reports to third parties that contained both false and
24 misleading information, which had an adverse effect on consumers' ability to obtain
25 employment.

26 8. Additionally, First Advantage also willfully violated the FCRA by failing
27 to provide notice to consumers that adverse public record information was being
28

1 conveyed to potential employers. First Advantage deprived applicants of an opportunity
2 to correct the false and misleading information.

3 9. As a result of Defendants' willful violations of the FCRA, Plaintiff
4 Downing and the members of the Classes were deprived of their privacy rights
5 guaranteed to them by federal law, and they are therefore entitled to statutory damages of
6 at least \$100 and not more than \$1,000 for each willful violation. *See* 15 U.S.C. §
7 1681n(a)(1)(A).

8 **PARTIES**

9 10. Plaintiff Downing is a natural person and citizen of the State of Arizona. He
10 resides in Show Low, Navajo County, Arizona.

11 11. Defendant Lowe's is a North Carolina limited liability company with its
12 principal place of business located at 1000 Lowe's Blvd, Mooresville, North Carolina
13 28117.

14 12. Defendant First Advantage is a Delaware corporation with its principal
15 place of business located at 1 Concourse Pkwy NE, Suite 200, Atlanta, GA 30328.

16 **JURISDICTION AND VENUE**

17 13. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 because
18 this action arises under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*, which is
19 a federal statute. Jurisdiction is additionally proper under the Class Action Fairness Act,
20 28 U.S.C. § 1332(d), *et seq.* ("CAFA"), because the classes each consist of over 100
21 people, there is minimal diversity, and the amount in controversy, when aggregated, is
22 over \$5,000,000. Further, none of the exceptions to CAFA jurisdiction apply.

23 14. This Court has personal jurisdiction over Defendants because they conduct
24 substantial business in this District and the unlawful conduct alleged in the Complaint
25 occurred in this District or the unlawful decisions that lead to the violations of the FCRA
26 set forth in this Complaint were made in this District.

27 15. Venue is proper in this District under 28 U.S.C. § 1391 because a
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substantial part of the events and omissions giving rise to the claims occurred in or emanated from this District, and because Plaintiff resides in this District and applied for work with Lowe's in this District.

FACTS COMMON TO PLAINTIFF AND ALL COUNTS

16. Lowe's is a well-known American retail company specializing in home improvement. It operates warehouse-style home improvement stores throughout the United States, including Arizona.

17. First Advantage is a consumer reporting agency that collects and aggregates information about consumers world-wide. First Advantage generates a substantial portion of its business and income by providing background screening services to employers nationwide

18. In or around February 2022, Plaintiff applied for a job with Lowe's at a store located in Show Low, Arizona.

19. In or around February 2022, in connection with his employment application, Plaintiff was required to complete various acknowledgments of company disclosures, including a disclosure regarding Plaintiff's background report.

20. Rather than provide a standalone disclosure—as the FCRA unambiguously requires—Plaintiff was presented with a document styled, "Disclosure Regarding Background Report." (See FCRA Disclosure, a true and accurate copy of which is attached hereto as Ex. A.) The pre-report disclosure that Lowe's provided to applicants and employees unlawfully combines disclosures to obtain consumer reports regarding applicants and their children or wards. It states:

Lowe's Companies, Inc. and/or its affiliates, including Lowe's Home Centers, LLC, ("Lowe's") may obtain a "background report" about you or your child/ward for employment purposes from a third-party consumer reporting agency. "Background report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on your or your child's/ward's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. The reports may include information regarding your or your child's/ward's history, criminal history, social security verification, motor

1 vehicle records, verification of your education or employment history, or
2 other background check results.
3 Lowe's will not request any information related to your or your child's/ward's
4 worthiness, credit standing, or credit capacity without providing you or your
5 child/ward, separately, with information related to the use of that information
6 and obtaining separate authorization from you to obtain such information,
7 where required.

8 (See Ex. A).

9 21. That is, Lowe's provides a single disclosure that seeks to satisfy the
10 disclosure requirements for it to obtain a consumer report regarding both the applicants
11 and their children, including their or their children's criminal history, motor vehicle
12 records, credit standing, credit capacity, educational history, employment history and
13 more.

14 22. The disclosure also contains additional extraneous information: Despite
15 initially explaining that a consumer report may contain information relating to the
16 applicant's or their children's credit worthiness, credit standing, and credit capacity, in
17 the very next paragraph Lowe's purports to explain that it will not request any
18 information relates to applicant's or their children's "worthiness, credit standing, or credit
19 capacity" unless it provides a separate disclosure and authorization for credit information.

20 23. The disclosure does not standalone, nor is it clear and conspicuous. It is
21 opaque and confusing.

22 24. The inclusion of such extraneous information overshadows the consumer
23 report disclosure and renders the disclosure confusing to Plaintiff and the other class
24 members. By combining the disclosure to obtain an applicant's consumer report with a
25 disclosure to obtain information about their child or ward in a single document, and by
26 including a confusing and conflicting explanation regarding future disclosures, it is
27 unclear whether Lowe's intends to procure consumer reports regarding applicants, their
28 children/wards, or both. Nowhere does Lowe's make any attempt to explain why it would
need to access the consumer report of an applicant's children, wards, or other offspring.
This lack of clarity frustrates the purpose of the FCRA, which is to inform consumers and

1 allow them a meaningful opportunity to authorize such disclosures. Had a lawful
2 disclosure been provided, Plaintiff and others would not have signed it.

3 25. For its part, First Advantage furnished consumer reports to Lowe's and
4 other potential employers without first implementing reasonable procedures to ensure the
5 maximum possible accuracy of the information contained in the report, and failed to
6 implement strict procedures designed to ensure that when public information contained in
7 a consumer report is likely to have an adverse effect on a consumer's ability to obtain
8 employment, that such sensitive information is complete and up to date.

9 26. Lowe's contracted with First Advantage to compile and furnish a consumer
10 report regarding Downing and other class members for employment purposes.

11 27. On or about February 26, 2022, First Advantage commenced a search for
12 Plaintiff's past criminal history to be included in his consumer report.

13 28. After the search commenced, First Advantage noted that additional
14 handling was required with respect to Plaintiff's past criminal history.

15 29. On February 26, 2022, First Advantage noted that research was required
16 with respect to Plaintiff's past criminal history.

17 30. On March 2, 2022, First Advantage again noted that research was required
18 with respect to Plaintiff's past criminal history.

19 31. On March 2, 2022, First Advantage furnished a consumer report regarding
20 Plaintiff to Lowe's for employment purposes.

21 32. The report included inaccurate and materially misleading information
22 relating to Plaintiff's prior criminal history, which had a negative impact on his
23 employment opportunities. In preparing the report, First Advantage failed to follow
24 reasonable procedures to ensure the maximum possible accuracy of the information
25 contained in the report. Instead, First Advantage furnished an inaccurate report
26 containing three past criminal convictions with the disposition stated as "guilty".
27

28 33. While Plaintiff did plead guilty to the three criminal charges between 2006

1 and 2009, it is not accurate to state that the disposition of those cases is “guilty”.

2 34. On November 24, 2020, the Navajo County Superior Court issued an Order
3 setting aside Plaintiff’s judgments of guilt (*see* Order Setting Aside Judgment of Guilt, a
4 true and accurate copy of which is attached hereto as Ex. B), which restored Plaintiff’s
5 civil rights under Arizona law pursuant to A.R.S. § 13-905. The Order setting aside the
6 judgments of guilt were made publicly available at
7 <https://apps.supremecourt.az.gov/publicaccess/minutes.aspx>.

8 35. Judgments setting aside guilt are not some arbitrary distinction. Rather,
9 when a court sets aside a criminal conviction pursuant to A.R.S. § 13-905 and includes a
10 certificate of second chance, the individual’s civil rights are restored, including
11 occupational rights. The restoration of rights includes the release of the individual from
12 all barriers and disabilities in obtaining occupational licenses issued under Arizona Title
13 32. *See* A.R.S. § 13-905(K). Further, Arizona law provides potential employers with
14 protection should they choose to hire individuals that have had their convictions set aside.
15 *Id.*; *see also* A.R.S. § 12-558.03, *et seq.*

16 36. By failing to inform potential employers that a prior conviction was set
17 aside, First Advantage provides false and inaccurate information that deprives employers
18 of critical data needed to make an informed decisions regarding potential applicants. It
19 also strips job applicants like Plaintiff from having the ability to attain gainful
20 employment.

21 37. Additionally, despite preparing the report with public record information
22 that was likely to have an adverse effect on Plaintiff’s ability to obtain employment, First
23 Advantage also failed to provide any notice that the information was being furnished to
24 Lowe’s. This failure deprived Plaintiff of a meaningful opportunity to correct the
25 inaccurate information.

26 38. On or around March 10, 2022, Lowe’s informed Plaintiff that he was being
27 denied employment based in whole or in part on information contained within his
28

1 consumer report.

2 39. Based on foregoing, Plaintiff brings this suit, on behalf of himself and those
3 similarly situated, seeking redress for Defendants' widespread and willful violations of
4 the FCRA. Such violations entitle him, and other similarly situated persons, to statutory
5 damages of not less than \$100 and not more than \$1,000 per violation.

6 CLASS ACTION ALLEGATIONS

7 40. Plaintiff brings this action pursuant to Federal Rule of Civil Procedure Rule
8 23(b)(3) on behalf of himself and the following Classes defined as follows:

9 **Lowe's Class:** All persons in the United States who (1) from a date two
10 years prior to the filing of the initial complaint in this action to the date
11 notice is sent to the Class; (2) applied for employment with Lowe's; (3)
12 about whom Lowe's procured a consumer report; and (4) who were
13 provided the same form FCRA disclosure and authorization as the
disclosure and authorization form Lowe's provided to Plaintiff.

14 **First Advantage Class:** All persons in the United States (1) from a date
15 two years prior to the filing of the initial complaint in this action to the date
16 notice is sent to the Class; (2) about whom First Advantage provided a
17 consumer report; (3) to any employer or potential employer; (4) where the
consumer report contained a criminal disposition of "guilty"; and (5) where
the consumer's conviction had been set aside pursuant to A.R.S. § 13-905.

18 41. Excluded from the Classes are (1) Defendants, Defendants' agents,
19 subsidiaries, parents, successors, predecessors, and any entity in which Defendants or
20 their parents have a controlling interest, and those entities' officers and directors, (2) the
21 Judge or Magistrate Judge to whom this case is assigned and the Judge's or Magistrate
22 Judge's immediate family, (3) persons who execute and file a timely request for
23 exclusion, (4) persons who have had their claims in this matter finally adjudicated and/or
24 otherwise released, (5) Plaintiff's and Defendants' counsel, and (6) the legal
25 representatives, successors, and assigns of any such excluded person. Plaintiff anticipates
26 the need to amend the Complaint, including the Class Definitions, following a reasonable
27 period for class discovery.

28 42. **Numerosity:** The exact number of class members is unknown to Plaintiff at

this time, but it is clear that individual joinder is impracticable for each of the Classes. On information and belief, there are thousands of individuals that fall into the defined Classes. Further, the class members can readily be ascertained through objective criteria, including Defendants' records.

43. **Commonality:** Common questions of law and fact exist as to all members of the Classes for which this proceeding will provide common answers in a single stroke based upon common evidence, including:

- (a) Whether First Advantage violated the FCRA;
- (b) Whether First Advantage prepared consumer reports with inaccurate criminal dispositions;
- (c) Whether First Advantage implemented policies and procedures to ensure maximum possible accuracy of the consumer reports that it prepares;
- (d) Whether First Advantage failed to follow its own policies and procedures to ensure the maximum possible accuracy of the consumer reports that it prepares;
- (e) Whether First Advantage implemented strict procedures to ensure that where adverse public record information reported on a consumer report is likely to impact an applicant's ability to obtain employment that the information is complete and up to date;
- (f) Whether First Advantage failed to follow its own procedures to ensure that adverse public record information that is reported on a consumer report is complete and up to date;
- (g) Whether First Advantage's violations of the FCRA were willful;
- (h) Whether Lowe's conduct described herein violated the FCRA;
- (i) Whether Lowe's has procured or caused to be procured consumer reports about job applicants and employees;

(c) Whether Lowe's disclosure violates the FCRA's requirement that the pre-report disclosure be clear and conspicuous in a document consisting solely of the disclosure; and

(j) Whether Lowe's violations of the FCRA were willful.

44. **Typicality:** As a result of Defendants' uniform and repeated pattern of providing and preparing consumer reports, Plaintiff and the Class Members suffered the same injury and similar damages. If Defendants' actions violated the FCRA as to Plaintiff, then it violated the FCRA as to all Class Members. Thus, Plaintiff's claims are typical of the claims of the other Class Members.

45. **Adequate Representation:** Plaintiff is a member of the Classes and both he and his counsel will fairly and adequately represent and protect the interests of the Classes, as neither has interests adverse to those of the Class Members and Defendants have no defenses unique to Plaintiff. In addition, Plaintiff has retained counsel competent and experienced in complex litigation and class actions including class actions related to the procurement of consumer reports for employment purposes under the Fair Credit Reporting Act. Further, Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the members of the Classes, and they have the financial resources to do so.

46. **Predominance:** The common questions of law and fact set forth above go to the very heart of the controversy and predominate over any supposed individualized questions. Irrespective of any given Class Member's situation, the answer to whether Defendants' conduct described herein repeatedly violated the FCRA is the same for everyone—a resounding “yes”—and the same will be proven using common evidence.

47. **Superiority and Manageability:** A class action is superior to all other methods of adjudicating the controversy. Joinder of all class members is impractical, and the damages suffered by/available to any individual Class Members will likely be small relative to the cost associated with prosecuting a lawsuit. Thus, the expense of litigating an individual action will likely prohibit the Class Members from obtaining effective relief

for Defendants' misconduct. In addition, there are numerous common factual and legal questions that could result in inconsistent verdicts should there be several successive trials. In contrast, a class action will present far fewer management difficulties, and it will increase efficiency and decrease expense. Further, class-wide adjudication will also ensure a uniform decision for the Class Members.

48. Plaintiff reserves the right to revise the definition of the Classes as necessary based upon information obtained in discovery.

COUNT I
Violation of 15 U.S.C. § 1681b, *et seq.*
(On Behalf of Plaintiff and the Lowe's Class)

49. Plaintiff incorporates by reference the foregoing allegations as if fully set forth herein.

50. The FCRA declares that:

Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes

15 U.S.C. § 1681b(b)(2)(A) (emphasis added).

51. The FCRA defines a consumer report as:

. . . any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumers' credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or excepted to be used or collected in whole or in part for the purpose of serving as a factor establishing the consumer's eligibility for . . .

(B) employment purposes . . .

15 U.S.C. § 1681a(d)(1).

52. Lowe's employment background checks are consumer reports.

1 53. The pre-report disclosure that Lowe’s provided to applicants and
2 employees unlawfully combines a disclosure to obtain consumer reports about them with
3 a disclosure to obtain consumer reports about their children or wards. (Ex. A.) Lowe’s
4 provides a single disclosure that confusingly combines information about both the
5 applicants themselves as well as regarding their children or wards, including their or their
6 children’s/ward’s criminal history, motor vehicle records, credit standing, credit capacity,
7 educational history, employment history and more. (*Id.*)

8 54. The disclosure also contains additional extraneous information that appears
9 confusing and contradictory. (*Id.*) Despite explaining that a consumer report may contain
10 information relating to the applicant’s or their children’s/ward’s credit worthiness, credit
11 standing, and credit capacity, in the very next paragraph Lowe’s purports to explain that it
12 will not request any information relates to applicant’s or their children’s/ward’s
13 “worthiness, credit standing, or credit capacity” unless it provides a separate disclosure
14 and authorization for such credit information. (*Id.*)

15 55. By combining the applicant’s and their children’s/ward’s disclosure into
16 one document, and by including a confusing and conflicting explanation regarding
17 disclosures, Lowe’s disclosure cannot be said to “stand alone” in a document that consists
18 solely of the disclosure. A reasonable person would not have understood or authorized
19 the reports had an appropriate disclosures been provided. Plaintiff and the other class
20 members wouldn't have authorized the reports had appropriate disclosures been provided.

21 56. Defendant procured consumer reports with respect to Plaintiff and the
22 Lowe’s Class. The disclosures provided to Plaintiff were the same or substantially the
23 same as the one provided to all Lowe’s Class members. Thus, Defendant uniformly
24 violated the FCRA rights of all Class members in the same way and, in the process,
25 violated their right to information and their privacy rights as delineated by Congress.

26 57. Defendant’s violation of 15 U.S.C. § 1681b(b)(2)(A)(i) was willful for at
27 least the following reasons:
28

- (i) The rule that FCRA disclosures consist “solely” of that disclosure has been the law established for well over a decade.
- (ii) Lowe’s is a large company who regularly engages outside counsel—it had ample means and opportunity to seek legal advice regarding its FCRA responsibilities. As such, any violations were made in conscious disregard of the rights of others.
- (iii) Lowe’s previously settled a class action lawsuit for alleged violations of the FCRA’s stand alone disclosure requirements. As such, its failure to comply with the FCRA cannot be seen as anything other than a willful defiance of the Act’s requirements.
- (iv) Lowe’s inclusion of the disclosures relating to applicant’s children or wards was intentional and serves no purpose to the vast majority of job applicants, including Plaintiff; and
- (v) Clear judicial and administrative guidance—dating back to at least the 1990s—regarding a company’s FCRA responsibilities exists and is readily available explaining that such disclosures must stand-alone. This readily-available guidance means Lowe’s either was aware of its responsibilities or plainly should have been aware of its responsibilities but ignored them and violated the FCRA anyway.
- (vi) The Ninth Circuit has clearly articulated the law in this area in a series of cases, beginning in 2017: *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017); *Gilberg v. Cal. Check Cashing Stores, LLC*, 913 F.3d 1169 (9th Cir. 2019); and *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082, 1095 (9th Cir. 2020). Thus, at this point in time there is no excuse for a company like Lowe’s to be in noncompliance with the FCRA’s clear and unambiguous requirements.

58. Plaintiff and the Lowe’s Class seek damages under 15 U.S.C. § 1681n, *et seq.* Indeed, Plaintiff and the Lowe’s Class are entitled to statutory damages of not less than \$100 and not more than \$1,000 for each of Defendant’s willful violations pursuant to 15 U.S.C. § 1681n(a)(1)(A).

59. In the alternative, Plaintiff and the Lowe’s Class seek actual damages under 15 U.S.C. § 1681o, *et seq.* Lowe’s acted negligently by failing to provide a standalone disclosure. Had Lowe’s provided a standalone disclosure, Plaintiff and the class members would not have authorized the procurement of their reports. As such, Lowe’s breached its duty of care to Plaintiff and the Lowe’s Class and this breach is the direct and proximate

1 cause of Plaintiff's and the class members' damages. Plaintiff seeks actual damages in an
2 amount to be proven at trial or, at a minimum, seeks nominal damages.

3 60. Accordingly, under the FCRA, Plaintiff and the Lowe's Class seek
4 statutory damages, reasonable cost and attorneys' fees, pre- and post-judgment interest,
5 and such other relief as the Court deems necessary, reasonable, and just.

6 **COUNT II**
7 **Violation of 15 U.S.C. § 1681b, *et seq.***
8 **(On Behalf of Plaintiff and the Lowe's Class)**

9 61. Plaintiff incorporates by reference the foregoing allegations as if fully set
10 forth herein.

11 62. The FCRA declares that:

12 Except as provided in subparagraph (B), a person may not procure a
13 consumer report, or cause a consumer report to be procured, for
employment purposes with respect to any consumer, unless—

14 (i) a clear and conspicuous disclosure has been made in writing to the
15 consumer at any time before the report is procured or caused to be
16 procured, in a document that consists solely of the disclosure, that a
consumer report may be obtained for employment purposes

17 15 U.S.C. § 1681b(b)(2)(A) (emphasis added).

18 63. The FCRA defines a consumer report as:

19 . . . any written, oral, or other communication of any information by a
20 consumer reporting agency bearing on a consumers' credit worthiness,
21 credit standing, cred-it capacity, character, general reputation, personal
22 characteristics, or mode of living which is used or excepted to be used or
collected in whole or in part for the purpose of serving as a factor
establishing the consumer's eligibility for . . .

23 (B) employment purposes . . .

24 15 U.S.C. § 1681a(d)(1).

25 64. Lowe's background checks are consumer reports.

26 65. In addition to failing to stand-alone, Lowe's disclosure also willfully
27 violated the FCRA by not being clear and conspicuous. The disclosure repeatedly and
28 confusingly informs Plaintiff and the Class Members that Lowe's may obtain consumer

1 reports regarding both them and their children or wards. The scope of the consumer
2 reports can also include information concerning the applicant's or their children's or
3 ward's credit worthiness, credit standing, credit capacity, character, general reputation,
4 personal characteristics, mode of living, history, criminal history, social security
5 verification, motor vehicle records, verification of your education or employment history,
6 or other background check results. The inclusion of multiple disclosures regarding
7 applicants and their children or wards renders the disclosure confusing and cannot be said
8 to be "clear and conspicuous".

9 66. The disclosure also confusingly includes conflicting information regarding
10 the procurement of credit information. Again, Lowe's discloses that a consumer report
11 may contain information relating to the applicant's or their children's credit worthiness,
12 credit standing, and credit capacity. Then, in the very next paragraph, Lowe's purports to
13 explain that it will not request any information related to applicant's or their children's
14 "worthiness, credit standing, or credit capacity" unless it provides a separate disclosure
15 and authorization for credit information. The unnecessary inclusion of this conflicting
16 information detracts from the purpose of the disclosure and renders the disclosure
17 confusing.

18 67. In short, the pre-report disclosure that Lowe's provided to Plaintiff and the
19 Lowe's Class members willfully violated the FCRA by not being clear and conspicuous.
20 Indeed, a reasonable person would have been confused by the disclosure.

21 68. Plaintiff and the other class members wouldn't have authorized the reports
22 had appropriate disclosures been provided.

23 69. Defendant procured consumer reports with respect to Plaintiff and the
24 Lowe's Class. The disclosures provided to Plaintiff were the same or substantially the
25 same as the one provided to all Lowe's Class members. Thus, Defendant uniformly
26 violated the FCRA rights of all Class members in the same way and, in the process,
27 violated their right to information and their privacy rights as delineated by Congress.
28

70. Defendant's violation of 15 U.S.C. § 1681b(b)(2)(A)(i) was willful for at least the following reasons:

- (i) The rule that FCRA disclosures be "clear and conspicuous" has been the law established for well over a decade;
- (ii) Lowe's is a large company who regularly engages outside counsel—it had ample means and opportunity to seek legal advice regarding its FCRA responsibilities. As such, any violations were made in conscious disregard of the rights of others;
- (iii) Lowe's previously settled a class action lawsuit for alleged violations of the FCRA's clear and conspicuous disclosure requirements. As such, its failure to comply with the FCRA cannot be seen as anything other than a willful defiance of the Act's requirements;
- (iv) Lowe's inclusion of the disclosures relating to applicant's children or wards was intentional and serves no purpose to the vast majority of job applicants, including Plaintiff; and
- (v) Clear judicial and administrative guidance—dating back to at least the 1990s—regarding a company's FCRA responsibilities exists and is readily available explaining that such disclosures must be clear and conspicuous. This readily-available guidance means Lowe's either was aware of its responsibilities or plainly should have been aware of its responsibilities but ignored them and violated the FCRA anyway.
- (vi) The Ninth Circuit has clearly articulated the law in this area in a series of cases, beginning in 2017: *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017); *Gilberg v. Cal. Check Cashing Stores, LLC*, 913 F.3d 1169 (9th Cir. 2019); and *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082, 1095 (9th Cir. 2020). Thus, at this point in time there is no excuse for a company like Lowe's to be in noncompliance with the FCRA's clear and unambiguous requirements.

71. Plaintiff and the Lowe's Class seek damages under 15 U.S.C. § 1681n, *et seq.* Indeed, Plaintiff and the Lowe's Class are entitled to statutory damages of not less than \$100 and not more than \$1,000 for each of Defendant's willful violations pursuant to 15 U.S.C. § 1681n(a)(1)(A).

72. In the alternative, Plaintiff and the Lowe's Class seek actual damages under 15 U.S.C. § 1681o, *et seq.* Lowe's acted negligently by failing to provide a disclosure

that was clear and conspicuous. Had Lowe's provided a clear and conspicuous disclosure, Plaintiff and the class members would not have authorized the procurement of their reports. As such, Lowe's breached its duty of care to Plaintiff and the Lowe's Class and this breach is the direct and proximate cause of Plaintiff's and the class members' damages. Plaintiff seeks actual damages in an amount to be proven at trial or, at a minimum, seeks nominal damages.

73. Accordingly, under the FCRA, Plaintiff and the Lowe's Class seek statutory damages, reasonable cost and attorneys' fees, pre- and post-judgment interest, and such other relief as the Court deems necessary, reasonable, and just.

COUNT III

Violation of 15 U.S.C. § 1681e, *et seq.*

(On Behalf of Plaintiff and the First Advantage Class)

74. Plaintiff incorporates by reference the foregoing allegations as if fully set forth herein.

75. First Advantage is a "person" and a "consumer reporting agency" as defined by 15 U.S.C. § 1681a(b) and (f).

76. Plaintiff and members of the First Advantage Class are "consumers" as that term is defined by 15 U.S.C. § 1681a(c).

77. The FCRA declares that "[w]henver a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b).

78. First Advantage prepared inaccurate and materially misleading consumer reports relating to Plaintiff's prior criminal history, which had a negative impact on his employment opportunities.

79. In preparing the report, First Advantage failed to follow reasonable procedures to assure the maximum possible accuracy of the information contained in the report. Indeed, First Advantage furnished a report containing three prior criminal

convictions with the disposition stated as “guilty”. This was inaccurate.

80. While Plaintiff pleaded guilty to the three charges between 2006 and 2009, he has since taken steps to rehabilitate his standing in his community such that the disposition is no longer “guilty”.

81. On November 24, 2020, the Navajo County Superior Court issued an Order setting aside Plaintiff’s judgments of guilt (*see* Ex. B), which restored Plaintiff’s civil rights under Arizona law pursuant to A.R.S. § 13-905. The Order setting aside the judgments of guilt were made publicly available at <https://apps.supremecourt.az.gov/publicaccess/minutes.aspx>.

82. The judgments setting aside guilt are not the same as a criminal conviction. Rather, when a court sets aside a criminal conviction pursuant to A.R.S. § 13-905 and includes a certificate of second chance, the individual’s civil rights are restored, including occupational rights. The restoration of rights includes the release of the individual from all barriers and disabilities in obtaining occupational licenses issued under Arizona Title 32. *See* A.R.S. § 13-905(K). Further, Arizona law provides potential employers with protection should they choose to hire individuals that have had their convictions set aside. *Id.*; *see also* A.R.S. § 12-558.03, *et seq.*

83. By failing to inform potential employers that a prior conviction was set aside, First Advantage robs employers of critical information to make an informed decision regarding potential applicants and the potential risks associated with hiring applicants.

84. By failing to adopt adequate procedures, First Advantage caused Plaintiff and the class members actual harm by preparing and providing inaccurate and materially misleading consume reports to third parties.

85. On information and belief, First Advantage has prepared more than one report regarding Plaintiff that contained the same inaccurate information.

86. On information and belief, First Advantage’s inclusion of the “guilty” disposition on Plaintiff’s consumer report violated its own written policies and

1 procedures to ensure the maximum possible accuracy of the information contained in
2 consumer reports.

3 87. Pursuant to 15 U.S.C. § 1681o, *et seq.* and 15 U.S.C. § 1681n, *et seq.*, First
4 Advantage is liable to Plaintiff and the First Advantage Class for failing to implement
5 and follow reasonable procedures to assure the maximum possible accuracy of Plaintiff's
6 and the class members' consumer reports in violation of 15 U.S.C. § 1681e(b).

7 88. Defendant's violation of 15 U.S.C. § 1681e(b) was willful for at least the
8 following reasons:

- 9 (i) The rule that consumer reporting agencies must implement and follow
10 reasonable procedures to assure the maximum possible accuracy of
11 the information contained in consumer reports has been the law
12 established for decades;
- 13 (ii) On information and belief, First Advantage adopted and then failed to
14 follow its own written policies and procedures to ensure the maximum
15 possible accuracy of the information contained in consumer reports;
- 16 (iii) First Advantage commenced the search for Plaintiff's criminal history
17 on February 26, 2022 and completed the report on March 2, 2022.
18 Hence, ample time existed for First Advantage to ensure that the
19 criminal convictions were reported accurately;
- 20 (iv) The report prepared by First Advantage regarding Plaintiff noted that
21 "Research [was] In Progress" for four days and further noted that
22 "Additional handling [was] required" with respect to Plaintiff's
23 criminal history. Despite this additional research and handling, First
24 Advantage failed to report Plaintiff's or the class members' criminal
25 convictions accurately;
- 26 (v) The Order setting aside Plaintiff's judgment of guilt and restoring his
27 civil rights has been publicly available for over a year at the time the
28 report was furnished;
- (vi) First Advantage is a large corporation who regularly engages inside
and outside counsel—it had ample means and opportunity to seek
legal advice regarding its FCRA responsibilities. As such, any
violations were made in conscious disregard of the rights of others;
- (vii) First Advantage describes itself as a leader in the background
reporting industry with respect to employment related consumer
reports;

(viii) First Advantage regularly furnishes consumer reports to businesses, such as Lowe's, for the purpose of making employment related decisions. Accordingly, First Advantage's failure to implement reasonable procedures had a widespread effect; and

(ix) First Advantage profited off the sale of Plaintiff's and the class members' consumer reports containing incomplete and outdated information on a repeated basis.

89. Plaintiff and the First Advantage Class seek damages under 15 U.S.C. § 1681n, *et seq.* Indeed, Plaintiff and the First Advantage Class are entitled to statutory damages of not less than \$100 and not more than \$1,000 for each of Defendant's willful violations pursuant to 15 U.S.C. § 1681n(a)(1)(A).

90. In the alternative, Plaintiff and the First Advantage Class seek actual damages under 15 U.S.C. § 1681o, *et seq.* First Advantage acted negligently by failing to adopt reasonable procedures to ensure the maximum possible accuracy of information contained in consumer reports. As such, First Advantage breached its duty of care to Plaintiff and the First Advantage Class and this breach is the direct and proximate cause of Plaintiff's and the class members' damages. Plaintiff seeks actual damages in an amount to be proven at trial or, at a minimum, seeks nominal damages.

91. Accordingly, under the FCRA, Plaintiff and the First Advantage Class seek statutory damages, reasonable cost and attorneys' fees, pre- and post-judgment interest and such other relief as the Court deems necessary, reasonable, and just.

COUNT IV

Violation of 15 U.S.C. § 1681k, *et seq.*

(On Behalf of Plaintiff and the First Advantage Class)

92. Plaintiff incorporates by reference the foregoing allegations as if fully set forth herein.

93. First Advantage is a "person" and a "consumer reporting agency" as defined by 15 U.S.C. § 1681a(b) and (f).

94. Plaintiff and members of the First Advantage Class are "consumers" as that term is defined by 15 U.S.C. § 1681a(c).

95. The FCRA declares that:

A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall--

(1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or

(2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

15 U.S.C. § 1681k(a) (emphasis added).

96. First Advantage furnished consumer reports regarding Plaintiff and the First Advantage Class for employment purposes that possessed information on consumers that were likely to have an adverse effect upon a consumer's ability to obtain employment.

97. First Advantage violated Section 1681k(a)(2) by failing to adopt strict procedures designed to insure that public record information that is likely to have an adverse effect on a consumer's ability to obtain employment is complete and up to date.

98. First Advantage also failed to provide Plaintiff and the First Advantage Class with notice that First Advantage was reporting public record information to potential employers that was likely to have an adverse effect on the ability of Plaintiff and the First Advantage Class to obtain employment. Further, First Advantage failed to provide Plaintiff or the other members of the First Advantage Class with the name and

1 address of the person to whom such information was being reported.

2 99. Criminal convictions or information showing “guilty” with respect to
3 crimes is likely to have an adverse effect on a consumer’s ability to obtain employment.

4 100. Here, First Advantage reported the disposition of past criminal convictions
5 for Plaintiff and the Class as “guilty”. This was inaccurate. Records of past criminal
6 convictions are public records under the FCRA. At the time the report was furnished, the
7 convictions were set aside and Plaintiff’s and the class members’ civil rights were
8 restored pursuant to A.R.S. § 13-905.

9 101. By publishing past criminal convictions without their current disposition,
10 First Advantage reported adverse public information that was not complete or up to date.

11 102. First Advantage failed to adopt strict procedures to ensure that criminal
12 convictions are reported with the current disposition. This constitutes a willful violation
13 of Section 1681k(a)(2).

14 103. On information and belief, First Advantage’s failure to report that the
15 criminal convictions were set aside and that civil rights were restored violated its own
16 written policies and procedures to ensure that information contained in consumer reports
17 is complete and up to date.

18 104. By failing to adopt strict procedures or provide any notice, First Advantage
19 harmed applicant and employees by conveying inaccurate information regarding their
20 criminal history to third parties and deprived applicants and employees of the ability to
21 address any inaccurate or incomplete information contained within the consumer report
22 prior to the employer’s decision regarding the information.

23 105. Pursuant to 15 U.S.C. § 1681o, *et seq.* and 15 U.S.C. § 1681n, *et seq.*, First
24 Advantage is liable to Plaintiff and the First Advantage Class for failing to provide notice
25 that potentially adverse public record information was being reported or by failing to
26 implement and follow strict procedures to ensure that information contained in Plaintiff’s
27 and the class members’ consumer reports that was likely to adversely impact their ability
28 to obtain or keep employment was complete and up to date in violation of 15 U.S.C. §

1 1681k(a)(2).

2 106. First Advantage's violation of 15 U.S.C. § 1681k(a)(2) was willful for at
3 least the following reasons:

- 4 (i) The rule that consumer reporting agencies must implement and follow
5 strict procedures to insure that potentially adverse public record
6 information contained in consumer reports must be complete and up
7 to date has been the law established for decades;
- 8 (ii) The rule that consumer reporting agencies provide notice that
9 potentially adverse public record information is being reported by a
10 consumer reporting agency has been the law established for decades;
- 11 (iii) On information and belief, First Advantage adopted and then failed to
12 follow its own written policies and procedures to ensure that
13 information contained in consumer reports is complete and up to date;
- 14 (iv) First Advantage commenced the search for Plaintiff's criminal history
15 on February 26, 2022 and completed the report on March 2, 2022.
16 Hence, ample time existed for First Advantage to ensure that the
17 criminal convictions were up to date and complete;
- 18 (v) The report prepared by First Advantage regarding Plaintiff noted that
19 "Research [was] In Progress" for four days and further noted that
20 "Additional handling [was] required" with respect to Plaintiff's
21 criminal history;
- 22 (vi) The Order setting aside Plaintiff's judgment of guilt and restoring his
23 civil rights has been publicly available for over a year at the time the
24 report was furnished;
- 25 (vii) First Advantage is a large corporation who regularly engages inside
26 and outside counsel—it had ample means and opportunity to seek
27 legal advice regarding its FCRA responsibilities. As such, any
28 violations were made in conscious disregard of the rights of others;
- (viii) First Advantage describes itself as a leader in the background
reporting industry with respect to employment related consumer
reports;
- (ix) First Advantage regularly furnishes consumer reports to businesses,
such as Lowe's, for the purpose of making employment related
decisions. Accordingly, First Advantage's failure to implement
reasonable procedures had a wide spread effect; and

- 1 (x) First Advantage profited off the sale of Plaintiff's and the class
2 members' consumer reports containing incomplete and outdated
information on a repeated basis.

3 107. Plaintiff and the First Advantage Class seek damages under 15 U.S.C. §
4 1681n, *et seq.* Plaintiff and the First Advantage Class are entitled to statutory damages of
5 not less than \$100 and not more than \$1,000 for each of Defendant's willful violations
6 pursuant to 15 U.S.C. § 1681n(a)(1)(A).

7 108. In the alternative, Plaintiff and the First Advantage Class seek actual
8 damages under 15 U.S.C. § 1681o, *et seq.* First Advantage acted negligently by failing to
9 adopt strict procedures to insure that adverse public record information is complete and
10 up to date. As such, First Advantage breached its duty of care to Plaintiff and the First
11 Advantage Class and this breach is the direct and proximate cause of Plaintiff's and the
12 class members' damages. Plaintiff seeks actual damages in an amount to be proven at
13 trial or, at a minimum, seeks nominal damages.

14 109. Accordingly, under the FCRA, Plaintiff and the First Advantage Class seek
15 statutory damages, reasonable cost and attorneys' fees, pre- and post-judgment interest,
16 and such other relief as the Court deems necessary, reasonable, and just.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiff Justin Downing, individually and on behalf of the
19 Classes, respectfully requests that this Court issue an order of judgment:

- 20 A. Certifying this case as a class action on behalf of the Classes defined above,
21 appointing Justin Downing as class representative and appointing his
22 counsel as class counsel;
23 B. Finding that Defendants' actions constitute a violation of the FCRA;
24 C. Finding that Defendants' actions constitute a willful violation of the FCRA;
25 D. Awarding damages, including statutory damages where applicable, to
26 Plaintiff and the Classes in amounts to be determined at trial;
27 E. Awarding Plaintiff and the Classes their reasonable litigation expenses and
28 attorneys' fees;

1 F. Awarding Plaintiff and the Classes pre- and post- judgment interest, to the
2 extent allowable; and

3 G. Such further and other relief as the Court deems reasonable and just.

4 **JURY DEMAND**

5 Plaintiff requests a trial by jury of all claims that can be so tried.

6
7 Respectfully submitted,

8 Dated: October 27, 2022

JUSTIN DOWNING, individually and on
9 behalf of all others similarly situated,

10 By: /s/ Taylor T. Smith
11 One of Plaintiff's Attorneys

12 Penny L. Koepke
13 pkoepke@hoalow.biz
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15 4854 E. Baseline Road, Suite 104
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16 Steven L. Woodrow (admitted *pro hac vice*)
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21 Telephone: (720) 907-7628
Facsimile: (303) 927-0809

22 *Counsel for Plaintiff*
23
24
25
26
27
28

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the above titled document was served upon counsel of record by filing such papers via the Court's ECF system on October 27, 2022.

/s/ Taylor T. Smith

Exhibit A

eSignature Consent Form

Consent to Use Electronic Signature

By selecting the "Yes" option below, I hereby consent to the use of my electronic signature to execute the Authorization Form, which will appear on the following screen. I understand that my electronic signature will have the same legal effect, validity and enforceability as if I were to execute by handwritten signature. If I do not wish to have my electronic signature to have a binding effect, I must select "No" option below.

Right to Entering into Agreement in Non-Electronic Form

I understand that I have the right to agree to the Authorization Form on paper and to execute the Authorization Form by handwritten signature. In order to provide it in written form, I can print and upload the form in the Document Upload section upon completing my profile.

Withdrawing My Consent and Updating Information

I understand that I have the right to withdraw my consent to use electronic signature and the right to update my contact information at any time. If I decide at any point to withdraw my consent, I understand that the withdrawal is only prospective and shall not impact the legal effectiveness, validity or enforceability of the Authorization Form prior to the implementation of my request withdrawal. The effectiveness of the withdrawal will be within a reasonable period of time after receipt of the withdrawal. If I withdraw during the period where a screening service is in the process of being fulfilled or ordered, it may impact my application for employment, contract work or other purpose.

If I decide at any point to withdraw my consent, I may call First Advantage at (+1) 800-845-6004, or provide a signed letter via mail to the address below:

First Advantage Background Services Corp.

Consumer Center

P.O. Box 105292

Atlanta, GA 30348

Applicants based in South Asia and Pacific region (including Hong Kong, Singapore, Australia, New Zealand, Philippines and Malaysia) may instead contact the Compliance & Privacy Manager at Privacy.sapac@fadv.com or (+61) 2 9017 4300.

Requesting a Paper Copy of My Electronic Record

Upon request, I may obtain a paper copy of the Authorization Form by clicking 'print' before submitting. Additionally, I may call, mail a request, or email via the contact information shown above.

I have read and accept the eSignature terms outlined above.

Yes

Date

February 26, 2022

Consent

Lowe's Background Check Acknowledgement

I acknowledge that under certain circumstances, a full background check may be delayed. I understand

my employment may begin without the full background check results being available. If after my start date,

my background check is not approved, I understand and acknowledge that Lowe's will terminate my employment.

I have read and accept the terms outlined above.

Yes

Date

February 26, 2022

Disclosure

DISCLOSURE REGARDING BACKGROUND REPORT

Lowe's Companies, Inc. and/or its affiliates, including Lowe's Home Centers, LLC, ("Lowe's") may obtain a "background report" about you or your child/ward for employment purposes from a third-party consumer reporting agency. "Background report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on your or your child's/ward's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. The reports may include information regarding your or your child's/ward's history, criminal history, social security verification, motor vehicle records, verification of your education or employment history, or other background check results.

Lowe's will not request any information related to your or your child's/ward's worthiness, credit standing, or credit capacity without providing you or your child/ward, separately, with information related to the use of that information and obtaining separate authorization from you to obtain such information, where required.

Date February 26, 2022

Disclosure

DISCLOSURE REGARDING INVESTIGATIVE BACKGROUND REPORT

Lowe's Companies, Inc. and/or its affiliates, including Lowe's Home Centers, LLC, ("Lowe's") may obtain for employment purposes an "investigative background report" about you or your child/ward including information as to your character, general reputation, personal characteristics and mode of living. "Investigative background report" means a background report or portion thereof in which information on your or your child's/ward's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with your or your child's/ward's neighbors, friends, or associates or with others with whom you or your child/ward are acquainted or who may have knowledge concerning your or your child's/ward's character, general reputation, personal characteristics, and/or mode of living.

You or your child/ward have the right, upon written request made within a reasonable time after receipt of this notice, to request a complete and accurate disclosure of the nature and scope of any investigative background report requested about you or your child/ward.

Along with this disclosure, you are being provided with a copy of A Summary of Your Rights under the Fair Credit Reporting Act.

Please be advised that the nature and scope of the most common form of investigative background report obtained with regard to applicants for employment is an investigation into your or your child's/ward's education and/or employment history conducted by First Advantage Consumer Disclosure Center located at P.O. Box 105292, Atlanta, GA, 30348 phone: 1-800-845-6004.

Date February 26, 2022

Disclosure

FOR APPLICANTS TO LOCATIONS IN THE STATE OF WASHINGTON, PLEASE REVIEW THE SECTION "A SUMMARY OF YOUR RIGHTS UNDER THE WASHINGTON FAIR CREDIT REPORTING ACT"

Para informacion en espanol, visite <https://www.consumerfinance.gov/learnmore> o escriba a la Consumer Financial Protection Bureau, 1700 G Street N.W., Washington, DC 20006.

A Summary of Your Rights Under the Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies. There are many types of consumer reporting agencies, including credit bureaus and specialty agencies (such as agencies that sell information about check writing histories, medical records, and rental history records). Here is a summary of your major rights under the FCRA. For more information, including information about additional rights, go to <https://www.consumerfinance.gov/learnmore> or write to: Consumer Financial Protection Bureau, 1700 G Street N.W., Washington, DC 20552.

- You must be told if information in your file has been used against you. Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment - or to take another adverse action against you - must tell you, and must give you the name, address, and phone number of the agency that provided the information.

- You have the right to know what is in your file. You may request and obtain all the information about you in the files of a consumer reporting agency (your "file disclosure"). You will be required to provide proper identification, which may include your Social Security number. In many cases, the disclosure will be free. You are entitled to a free file disclosure if:

- a person has taken adverse action against you because of information in your credit report;
- you are the victim of identify theft and place a fraud alert in your file;
- your file contains inaccurate information as a result of fraud;
- you are on public assistance;
- you are unemployed but expect to apply for employment within 60 days.

In addition, all consumers are entitled to one free disclosure every 12 months upon request from each nationwide credit bureau and from nationwide specialty consumer reporting agencies. See <https://www.consumerfinance.gov/learnmore> for additional information.

Exhibit B

Filed on 12/7/2020 8:48:58 AM

Navajo County Superior Court
Deanne M. Romo, Clerk**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA****IN AND FOR THE COUNTY OF NAVAJO**

JUDGE:	DALE P. NIELSON	DIVISION:	III
CLERK:	DEANNE M. ROMO	DATE:	11/24/2020
DEPUTY CLERK:	SNW	TIME:	9:30 A.M.
COURT REPORTER:	Kelly Palmer		

MINUTE ENTRY

THE STATE OF ARIZONA,**Plaintiff,****Vs.****JUSTIN ANDREW DOWNING,****Defendant.**
Case No. S0900CR20060047
S0900CR20060048
S0900CR20090508
HEARING ON THE MOTION TO SET ASIDE

This is the date set for a hearing on the Motion to Set Aside. The record shall reflect the presence of the Defendant.

The Court noted for the record several attempts have been made to reach the County Attorney. The Court further noted there was no information from the County Attorney regarding the Defendant's Motion to Set Aside.

The Defendant was sworn, presented testimony and answered questions of the Court.

IT IS ORDERED granting the Motion to Set Aside Judgments of Guilt to include the restoration of the Defendant's civil rights and his right to own firearms.

Hearing adjourned at 9:33 A.M.

Copies to: NCAO, Justin Downing, Case Flow Manager, NCSO

Penny L. Koepke
pkoepke@hoalaw.biz
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Tel: (480) 833-1001

[Additional counsel appearing on signature page]

Attorneys for Plaintiff and the Classes

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Justin Downing, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

Lowe's Home Centers, LLC, a North
Carolina limited liability company, and
First Advantage Corporation, a Delaware
corporation,

Defendants.

Case No. 3:22-cv-08159-SPL

NOTICE OF APPEAL

Complaint filed: September 8, 2022

Pursuant to Federal Rules of Appellate Procedure 3 and 4, notice is hereby given that Plaintiff Justin Downing (“Plaintiff” or “Downing”) appeals to the United States Court of Appeals for the Ninth Circuit from the district court’s amended Fed. R. Civ. P. 54(b) Judgment entered on August 2, 2023 (dkt. 38), following the district court’s June 20, 2023, Order granting Defendant Lowe’s Home Centers, LLC’s motion to dismiss (dkt. 29).

Dated: August 14, 2023

JUSTIN DOWNING, individually and on
behalf of all others similarly situated,

By: /s/Taylor T. Smith
One of Plaintiff’s Attorneys

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Telephone: (720) 213-0675
Facsimile: (303) 927-0809

Attorneys for Plaintiff and the Putative Class

REPRESENTATION STATEMENT

Plaintiff-Appellant, Justin Downing, individually and on behalf of all others similarly situated, hereby submits the following Representation Statement:

PARTIES	COUNSEL OF RECORD
Plaintiff-Appellant Justin Downing, individually and on behalf of all others similarly situated	Steven L. Woodrow* Email: swoodrow@woodrowpeluso.com Patrick H. Peluso* Email: ppeluso@woodrowpeluso.com Taylor T. Smith* Email: tsmith@woodrowpeluso.com WOODROW & PELUSO, LLC 3900 East Mexico Avenue, Suite 300 Denver, Colorado 80210 Telephone: (720) 907-7628 Facsimile: (303) 927-0809 <i>*Pro Hac Vice</i>
Defendant-Appellee Lowe's Home Centers, LLC	Walker F. Crowson SNELL & WILMER L.L.P. One East Washington Street, Suite 2700 Phoenix, Arizona 85004-2202 Telephone: 602.382.6000 Facsimile: 602.382.6070 wcrowson@swlaw.com Jason C. Schwartz (<i>pro hac vice</i>) Molly T. Senger (<i>pro hac vice</i>) David A. Schnitzer (<i>pro hac vice</i>) Matt Gregory (<i>pro hac vice</i>) Gibson, Dunn & Crutcher LLP 1050 Connecticut Avenue, NW Washington, D.C. 20036-5306 Telephone: 202.955.8500 Facsimile: 202.467.0539 jschwartz@gibsondunn.com msenger@gibsondunn.com dschnitzer@gibsondunn.com mgregory@gibsondunn.com

1 **CERTIFICATE OF SERVICE**

2 I am a resident of the State of Colorado, over the age of eighteen years old, and am
 3 not a party to this lawsuit. My business address is 3900 E. Mexico Avenue, Suite 300,
 4 Denver, Colorado 80210. I HEREBY CERTIFY that on the 14th day of August 2023, I
 5 filed the foregoing **NOTICE OF APPEAL** electronically through the CM/ECF system,
 6 which caused the following parties or counsel to be served by electronic means, as more
 7 fully reflected on the Notice of Electronic Filing:

8 Walker F. Crowson
 9 SNELL & WILMER L.L.P.
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 10 Phoenix, Arizona 85004-2202
 Telephone: 602.382.6000
 11 Facsimile: 602.382.6070
 12 wcrowson@swlaw.com

13 Jason C. Schwartz (pro hac vice)
 14 Molly T. Senger (pro hac vice)
 David A. Schnitzer (pro hac vice)
 15 Matt Gregory (pro hac vice)
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 16 1050 Connecticut Avenue, NW
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 18 Facsimile: 202.467.0539
 jschwartz@gibsondunn.com
 19 msenger@gibsondunn.com
 20 dschnitzer@gibsondunn.com
 21 mgregory@gibsondunn.com

22 Attorneys for Defendant Lowe's Home Centers, LLC

23 I declare that the foregoing is true and correct.

24
 25 /s/ Taylor T. Smith
 26
 27
 28

APPEAL,STD

**U.S. District Court
DISTRICT OF ARIZONA (Prescott Division)
CIVIL DOCKET FOR CASE #: 3:22-cv-08159-SPL**

Downing v. Lowe's Companies Incorporated et al
Assigned to: Judge Steven P Logan
Case in other court: Ninth Circuit, 23-16102
Cause: 15:1681 Fair Credit Reporting Act

Date Filed: 09/08/2022
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutes: Other
Statutory Actions
Jurisdiction: Federal Question

Plaintiff

Justin Downing
*individually and on behalf of all others
similarly situated*

represented by **Patrick H Peluso**
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LEAD ATTORNEY
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ATTORNEY TO BE NOTICED

V.

Defendant

Lowe's Home Centers LLC
*a North Carolina limited liability
company*

represented by **David A Schnitzer**
Gibson Dunn & Crutcher LLP –
Washington, DC

TERMINATED: 06/20/2023

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Defendant

First Advantage Background Services Corporation
a Florida corporation

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Lowe's Companies Incorporated
a North Carolina corporation
TERMINATED: 10/27/2022

represented by **Jason Schwartz**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Walker Field Crowson

(See above for address)
ATTORNEY TO BE NOTICED

Defendant

First Advantage Corporation
a Delaware corporation
TERMINATED: 08/31/2023

represented by **Edward P Cadagin**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Henry Chalmers

(See above for address)
LEAD ATTORNEY
PRO HAC VICE
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Mandi Jean Karvis

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Natalie Cascario

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LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
------------	---	-------------

09/08/2022	<u>1</u>	COMPLAINT. Filing fee received: \$402.00, receipt number AAZDC-21079171 filed by Justin Downing. (Koepke, Penny) (Attachments: # <u>1</u> Civil Cover Sheet)(BAC) (Entered: 09/08/2022)
09/08/2022	<u>2</u>	SUMMONS Submitted by Justin Downing. (Koepke, Penny) (Attachments: # <u>1</u> Summons)(BAC) (Entered: 09/08/2022)
09/08/2022	<u>3</u>	Filing fee paid, receipt number AAZDC-21079171. This case has been assigned to the Honorable Steven P Logan. All future pleadings or documents should bear the correct case number: CV-22-08159-PCT-SPL. Notice of Availability of Magistrate Judge to Exercise Jurisdiction form attached. (BAC) (Entered: 09/08/2022)
09/08/2022	<u>4</u>	Summons Issued as to First Advantage Corporation, Lowe's Companies Incorporated. (Attachments: # <u>1</u> Summons)(BAC). *** IMPORTANT: When printing the summons, select "Document and stamps" or "Document and comments" for the seal to appear on the document. (Entered: 09/08/2022)
09/08/2022	<u>5</u>	NOTICE TO FILER OF DEFICIENCY re: <u>1</u> Complaint filed by Justin Downing. Document not in compliance with LRCiv 7.1(c) – Documents shall be converted to PDF directly from a word processing program and per Administrative Policies and Procedures Manual must be text searchable. <i>No further action is required</i> . This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAC) (Entered: 09/08/2022)
09/08/2022	<u>6</u>	PRELIMINARY ORDER: Both counsel and pro se litigants must abide by the Local Rules of Civil Procedure, Rules of Practice of the U.S. District Court for the District of Arizona, and the Federal Rules of Civil Procedure. Plaintiff(s) must file proof of service of the summons and complaint or of waiver of service with the Clerk of Court no later than 12/7/2022 and must promptly serve a copy of this Order on Defendant(s) and file notice of service with the Clerk of Court. Unless the Court orders otherwise, on 12/7/2022, the Clerk of Court shall terminate without further notice any Defendant in this action that has not been served pursuant to Rule 4(m) of the Federal Rules of Civil Procedure. <i>See the attached order for additional information</i> . Signed by Judge Steven P. Logan on 9/8/2022. (RMW) (Entered: 09/08/2022)
09/13/2022		Remark: Pro hac vice motion(s) granted for Steven L Woodrow, Patrick H Peluso, Taylor True Smith on behalf of Plaintiff Justin Downing. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 09/13/2022)
09/28/2022	<u>7</u>	MOTION for Extension of Time to File Answer re: <u>1</u> Complaint <i>Agreed Stipulation</i> by Lowe's Companies Incorporated. (Attachments: # <u>1</u> Proposed Order GRANTING STIPULATION FOR EXTENSION FOR DEFENDANTS TO ANSWER OR OTHERWISE RESPOND TO THE COMPLAINT)(Crowson, Walker) (Entered: 09/28/2022)
09/29/2022	<u>8</u>	STIPULATION FOR EXTENSION OF TIME TO ANSWER COMPLAINT re: <u>1</u> Complaint by First Advantage Corporation. (Attachments: # <u>1</u> Proposed Order)(Karvis, Mandi) (Entered: 09/29/2022)
10/03/2022	<u>9</u>	ORDER granting <u>7</u> and <u>8</u> Stipulations For Extension of Time To Answer Complaint : First Advantage Corporation answer due 10/28/2022; Lowe's Companies Incorporated answer due 10/28/2022. Signed by Judge Steven P Logan on 9/30/22. (MJW) (Entered: 10/03/2022)
10/04/2022		Remark: Pro hac vice motion(s) granted for Henry Chalmers on behalf of Defendant First Advantage Corporation. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 10/04/2022)
10/05/2022		Remark: Pro hac vice motion(s) granted for Edward P Cadagin on behalf of Defendant First Advantage Corporation. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 10/05/2022)
10/27/2022	<u>10</u>	NOTICE of Filing Amended Pleading pursuant to LRCiv 15.1(b) by Justin Downing . (Attachments: # <u>1</u> Exhibit A – Proposed First Amended Class Action Complaint)(Smith, Taylor) (Entered: 10/27/2022)

10/27/2022	<u>11</u>	AMENDED COMPLAINT <i>First Amended Class Action Complaint</i> against First Advantage Corporation, Lowe's Home Centers LLC filed by Justin Downing.(Smith, Taylor) (Entered: 10/27/2022)
10/31/2022	<u>12</u>	NOTICE OF ATTORNEY'S CHANGE OF ADDRESS/FIRM NAME by Walker Field Crowson. (Crowson, Walker) (Entered: 10/31/2022)
11/03/2022	<u>13</u>	Additional Attachments to Main Document re: <u>11</u> Amended Complaint <i>Exhibits A & B to First Amended Complaint</i> by Plaintiff Justin Downing. (Smith, Taylor) (Entered: 11/03/2022)
11/08/2022		Remark: Pro hac vice motion(s) granted for Jason Schwartz on behalf of Defendant Lowe's Home Centers LLC. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 11/08/2022)
11/08/2022		Remark: Pro hac vice motion(s) granted for David A Schnitzer on behalf of Defendant Lowe's Home Centers LLC. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 11/08/2022)
11/08/2022		Remark: Pro hac vice motion(s) granted for Molly Senger on behalf of Defendant Lowe's Home Centers LLC. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 11/08/2022)
11/09/2022		Remark: Pro hac vice motion(s) granted for Matthew Gregory on behalf of Defendant Lowe's Home Centers LLC. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 11/09/2022)
11/10/2022	<u>14</u>	MOTION to Dismiss for Failure to State a Claim by Lowe's Companies Incorporated, Lowe's Home Centers LLC. (Schwartz, Jason) (Entered: 11/10/2022)
11/10/2022	<u>15</u>	MOTION to Dismiss Counts/Claims : Count III and Count IV of Plaintiff's First Amended Complaint by First Advantage Corporation. (Karvis, Mandi) (Entered: 11/10/2022)
11/10/2022	<u>16</u>	NOTICE re: Certification of Good Faith Conferral by First Advantage Corporation re: <u>15</u> MOTION to Dismiss Counts/Claims : Count III and Count IV of Plaintiff's First Amended Complaint . (Karvis, Mandi) (Entered: 11/10/2022)
11/10/2022	<u>17</u>	Corporate Disclosure Statement by First Advantage Corporation. (Karvis, Mandi) (Entered: 11/10/2022)
11/10/2022	<u>18</u>	AMENDED MOTION to Dismiss for Failure to State a Claim [<i>Corrected PDF Conversion Error</i>] by Lowe's Companies Incorporated, Lowe's Home Centers LLC. (Schwartz, Jason) (Entered: 11/10/2022)
11/10/2022	<u>19</u>	Corporate Disclosure Statement by Lowe's Home Centers LLC identifying Corporate Parent Lowe's Companies, Inc. for Lowe's Home Centers LLC. (Schwartz, Jason) (Entered: 11/10/2022)
11/18/2022	<u>20</u>	STIPULATION re: <u>15</u> MOTION to Dismiss Counts/Claims : Count III and Count IV of Plaintiff's First Amended Complaint , <u>18</u> MOTION to Dismiss for Failure to State a Claim [<i>Corrected PDF Conversion Error</i>] <i>Stipulation to Extension of Time for Briefing of Defendants' Motions to Dismiss</i> by Justin Downing. (Attachments: # <u>1</u> Proposed Order)(Peluso, Patrick) (Entered: 11/18/2022)
11/23/2022	<u>21</u>	ORDER granting <u>20</u> Stipulation. FURTHER ORDERED that Plaintiff shall have until 12/9/2022, to file a Response to the Motions to Dismiss, and Defendants shall have until 12/23/2022, to file their respective replies in support of their Motions to Dismiss. Signed by Judge Steven P. Logan on 11/22/2022. (RMW) (Entered: 11/23/2022)
12/09/2022	<u>22</u>	RESPONSE in Opposition re: <u>15</u> MOTION to Dismiss Counts/Claims : Count III and Count IV of Plaintiff's First Amended Complaint <i>Plaintiff's Response in Opposition to Defendant First Advantage Corporation's Motion to Dismiss and/or to Strike Plaintiff's Class Claims</i> filed by Justin Downing. (Smith, Taylor) (Entered: 12/09/2022)
12/09/2022	<u>23</u>	RESPONSE in Opposition re: <u>18</u> MOTION to Dismiss for Failure to State a Claim [<i>Corrected PDF Conversion Error</i>] <i>Response in Opposition to Defendant Lowe's Home Centers, LLC's Motion to Dismiss Counts I and II</i> filed by Justin Downing.

		(Attachments: # <u>1</u> Exhibit A – Disclosure)(Peluso, Patrick) (Entered: 12/09/2022)
12/23/2022	<u>24</u>	REPLY to Response to Motion re: <u>18</u> MOTION to Dismiss for Failure to State a Claim <i>[Corrected PDF Conversion Error]</i> filed by Lowe's Companies Incorporated, Lowe's Home Centers LLC. (Schwartz, Jason) (Entered: 12/23/2022)
12/23/2022	<u>25</u>	REPLY to Response to Motion re: <u>15</u> MOTION to Dismiss Counts/Claims : Count III and Count IV of Plaintiff's First Amended Complaint filed by First Advantage Corporation. (Karvis, Mandi) (Entered: 12/23/2022)
12/30/2022	<u>26</u>	NOTICE re: Supplemental Authority by Lowe's Companies Incorporated, Lowe's Home Centers LLC re: <u>18</u> MOTION to Dismiss for Failure to State a Claim <i>[Corrected PDF Conversion Error]</i> . (Schwartz, Jason) (Entered: 12/30/2022)
03/10/2023	<u>27</u>	NOTICE re: Supplemental Authority by Lowe's Companies Incorporated, Lowe's Home Centers LLC re: <u>18</u> MOTION to Dismiss for Failure to State a Claim <i>[Corrected PDF Conversion Error]</i> . (Schwartz, Jason) (Entered: 03/10/2023)
06/08/2023	<u>28</u>	ORDER denying <u>15</u> Motion to Dismiss Counts/Claims. Signed by Judge Steven P Logan on 6/8/23. (MJW) (Entered: 06/08/2023)
06/20/2023	<u>29</u>	ORDER that Defendant's Motion to Dismiss (Doc. <u>18</u>) is granted. Counts I and II are dismissed with prejudice, and Defendant Lowes Home Centers LLC is dismissed from this action. See document for complete details. Signed by Judge Steven P Logan on 6/20/2023. (WLP) (Entered: 06/20/2023)
06/22/2023	<u>30</u>	<i>Defendant First Advantage Corporation's</i> ANSWER to <u>11</u> Amended Complaint by First Advantage Corporation.(Karvis, Mandi) (Entered: 06/22/2023)
06/30/2023	<u>31</u>	MOTION for Entry of Judgment under Rule 54(b) by Justin Downing. (Attachments: # <u>1</u> Proposed Order)(Peluso, Patrick) (Entered: 06/30/2023)
07/14/2023	<u>32</u>	RESPONSE in Opposition re: <u>31</u> MOTION for Entry of Judgment under Rule 54(b) filed by Lowe's Home Centers LLC. (Schwartz, Jason) (Entered: 07/14/2023)
07/21/2023	<u>33</u>	REPLY to Response to Motion re: <u>31</u> MOTION for Entry of Judgment under Rule 54(b) filed by Justin Downing. (Peluso, Patrick) (Entered: 07/21/2023)
07/27/2023		Remark: Pro hac vice motion(s) granted for Natalie Cascario on behalf of Defendant First Advantage Corporation. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 07/27/2023)
07/28/2023	<u>34</u>	NOTICE of Service of Discovery filed by Justin Downing. (Smith, Taylor) (Entered: 07/28/2023)
07/31/2023	<u>35</u>	ORDER: Plaintiff's Motion for Certification of Judgment (Doc. <u>31</u>) is granted. The Clerk of Court is directed to enter a final judgment dismissing with prejudice all claims against Defendant Lowe's Companies Incorporated pursuant to Federal Rule of Civil Procedure 54(b). Signed by Judge Steven P Logan on 7/31/2023. (REK) (Entered: 07/31/2023)
07/31/2023	<u>36</u>	*Amended by <u>38</u> * CLERK'S JUDGMENT – Pursuant to the Court's order filed July 31, 2023, Plaintiff to take nothing, and the complaint and action are dismissed with prejudice. (REK) Modified on 8/2/2023 (REK). (Entered: 07/31/2023)
08/01/2023	<u>37</u>	NOTICE of Service of Discovery filed by First Advantage Corporation. (Chalmers, Henry) (Entered: 08/01/2023)
08/02/2023	<u>38</u>	AMENDED CLERK'S JUDGMENT – Pursuant to the Court's order filed July 31, 2023, Plaintiff to take nothing, and the complaint and action are dismissed with prejudice as to all claims against Defendant Lowes Companies Incorporated. (REK) (Entered: 08/02/2023)
08/02/2023	<u>39</u>	REPORT of Rule 26(f) Planning Meeting by Justin Downing. (Smith, Taylor) (Entered: 08/02/2023)
08/03/2023	<u>40</u>	ORDER SETTING RULE 16 CASE MANAGEMENT CONFERENCE: A Case Management Conference is set for 9/6/2023 at 02:00 PM in Courtroom 501, 401 West Washington Street, Phoenix, AZ 85003 before Judge Steven P Logan. Signed by Judge

		Steven P Logan on 8/2/23. (Attachments: # <u>1</u> Attachment – Case Management Order)(MJW) (Entered: 08/03/2023)
08/04/2023	<u>41</u>	ORDER: IT IS ORDERED that the Rule 16 Case Management Conference, presently set for September 6, 2023 before Honorable Steven P. Logan, is vacated. Order to follow. Signed by Judge Steven P Logan on 8/4/23. (MJW) (Entered: 08/04/2023)
08/04/2023	<u>42</u>	RULE 16 CASE MANAGEMENT ORDER: Discovery due by 5/24/2024. Dispositive motions due by 9/20/2024. Signed by Judge Steven P Logan on 8/4/23. (MJW) (Entered: 08/04/2023)
08/14/2023	<u>43</u>	NOTICE OF APPEAL to 9th Circuit Court of Appeals re: <u>29</u> Order, <u>35</u> Order, <u>38</u> Amended Clerks Judgment by Justin Downing. Filing fee received: \$505.00, receipt number AAZDC-22203043. (Smith, Taylor) *Modified linkage on 8/15/2023 (DXD). (Entered: 08/14/2023)
08/16/2023	<u>44</u>	USCA Case Number re: <u>43</u> Notice of Appeal. Case number 23-16102, Ninth Circuit. (BAC) (Entered: 08/17/2023)
08/31/2023	<u>45</u>	NOTICE of Filing Amended Pleading pursuant to LRCiv 15.1(b) by Justin Downing . (Attachments: # <u>1</u> Exhibit A – Proposed Second Amended Class Action Complaint)(Smith, Taylor) (Entered: 08/31/2023)
08/31/2023	<u>46</u>	AMENDED COMPLAINT <i>Second Amended Class Action Complaint</i> against Lowe's Home Centers LLC, First Advantage Background Services Corp. filed by Justin Downing. (Attachments: # <u>1</u> Exhibit A – Disclosure, # <u>2</u> Exhibit B – Order)(Smith, Taylor) (Entered: 08/31/2023)
09/05/2023	<u>47</u>	NOTICE of Service of Discovery filed by Justin Downing. (Smith, Taylor) (Entered: 09/05/2023)
09/07/2023	<u>48</u>	<i>Defendant First Advantage Background Services Corp.'s</i> ANSWER to <u>46</u> Amended Complaint, by First Advantage Background Services Corporation.(Karvis, Mandi) (Entered: 09/07/2023)
09/15/2023	<u>49</u>	NOTICE of Service of Discovery filed by Justin Downing. (Smith, Taylor) (Entered: 09/15/2023)
10/09/2023	<u>50</u>	STIPULATION <i>for Protective Order</i> by Justin Downing. (Attachments: # <u>1</u> Proposed Order)(Smith, Taylor) (Entered: 10/09/2023)
10/18/2023	<u>51</u>	ORDER denying <u>50</u> Stipulation for Protective Order. Signed by Judge Steven P Logan on 10/17/23. (MJW) (Entered: 10/18/2023)